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HINDU LAW
PAST AND PRESENT

BEING
AN ACCOUNT OF THE CONTROVERSY WHICH PRECEDED THE ENACTMENT OF THE HINDU CODE, THE TEXT OF THE CODE AS ENACTED, AND SOME COMMENTS THEREON

By

J. DUNCAN M. DERRETT

M.A. (Oxon.), Ph.D. (Lond.), Of Gray's Inn, Barrister-at-Law

Sometime Scholar of Jesus College, Oxford; Barcelona Prizeman in Comparative Law; Tagore Professor of Law for 1953, University of Calcutta; Lecturer in Hindu Law at the School of Oriental & African Studies, University of London.



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PREFACE

In the Spring of 1955 it was pointed out to the author that an introduction to the "Hindu Code Bill" controversy would be appreciated by those who, in Parliament or outside, were concerned to re-create the Hindu law. While men at the centre of affairs knew what was proposed, and upon what technical and other bases it rested, the observant Member of Parliament was as much at the mercy of varying gusts of hope and apprehension as the average elector; and a brief guide to this the most perplexing legislative project of our century appeared to be likely to satisfy some real demand, provided that its language was not too technical and its analysis of the project was neither too superficial nor too detailed.

Accordingly on returning from India he set to work as speedily as the arranging of very diverse material would permit, intending that the book should be published before the Hindu Marriage and Divorce Bill (as it was then called) reached the Lok Sabha (the Lower House of Parliament). But that Bill became the Hindu Marriage Act while the book was still being typed, and considerable amendments had to be made in the text. Since the emotional and intellectual effort involved in giving birth to this, the first of the statutes forming the "Code", was very great, it seemed likely that Parliament, then immersed in its unparalleled series of "advanced" statutes, would rest on its laurels, and take breath again before coping with the remainder of the "Code". But contrary to all expectations it forged ahead, and while this book was being sent to press the three succeeding statutes reached the statute-book. As each one was discussed, and the shape of the respective Bills varied and oscillated between quite wide alternative clauses, attempts were made to keep this book up to date. In some instances the project which eventually became law was more like that which had been suggested eight years earlier than that which had been in vogue two years before. In the end the greater part of this book had actually been printed before the author was in a position to cause his text to reflect the position obtaining at the time of publication. This fact accounts for the comparatively sharp difference in tone

between the sections before section 442 and those which follow it. The reader is warned that the present tense in most instances prior to section 442 should be read as if it were a past tense, and for the phrase "at present" we should read "formerly".

Naturally no tinkering with a text, even though thoroughly carried out, can turn a book which was designed for one purpose into one which is intended to meet another. This book may then, if cautious attention be paid to the corrections which follow, be used rather as a record of what agonies and perplexities preceded the enactment of the "Code", and as a general criticism of the manner in which that task was accomplished, than as a commentary on the finished product.

It should be evident to all those who peruse it that whereas the Hindu Code Bill drafted by the Rau Committee was a cautious and conservative project the "Code" which is now the law of the land is something very different. Granted that obvious flaws may be corrected in amending statutes (and the sooner the better), the nation has in fact set out on an adventure, which numbers of thinking Hindus view with alarm, if not horror. Experience of a few years' litigation may reassure them, and the wider use of testaments and settlements of property will go some way towards mitigating the literally and metaphorically catastrophic effects of the statutes. The author hopes that this book, despite its tardy appearance and inconsistencies of tone, may help to explain what has taken place and will enable the literate public to view more dispassionately and more accurately the future which is before them. If it is successful at least in explaining to them from what juridical darkness and confusion they have emerged he will be satisfied. His own freedom from prejudice in examining the facts may serve as his justification for attempting a task which others have thought it wiser to ignore.

A word of warning to the intellectually-minded may not come amiss. It will be evident to such a reader that the "Code" which is actually before us combines many characters: some are traditional; a few are archaic; while the majority are alike in being pioneering and quasi-experimental. From what appears to be a tasteless jumble he may too readily assume that this system of law, born in 1955-6, is academically unworthy of study, and is a concoction such as might have been thrown together by practitioners without experience and theorists without learning. When

he is reminded that one-seventh of the world's population is governed by it in respect of its most intimate and fundamental affairs he may exclaim that that only makes the position worse, and that we had better shut our eyes until the promised Indian Civil Code comes in—a project which is certain to be attended to as carefully as the Constitution itself was prepared. This would be an improper attitude to adopt for two reasons: the secret of the respective Bills' success in the admittedly radical Parliament of 1952-6 was the genius for compromise which was unquestionably given ample scope; and a glance through this book will show which elements have prevailed here and which have yielded there. And secondly, however repellent the "Code" may seem at first sight, it is the path to the goal, *viz.*, a Civil Code, and the deliberately-chosen path of a legislature which, however vaguely, realised that it was leading a uniquely complex nation towards a clearly-visualised if seldom-described Garden of Eden. The method adopted by this leadership deserves careful study, and treated as a transitional system, whose life may perhaps not endure beyond three-quarters of a century, the "Code" has something unique to offer the academic as well as the more practical student of affairs.

If a reader becomes tired of the "quibbles" that appear here and there he must remember that however irritating "quibbles" are to most laymen they are the breath of life to the Bench and the Bar. The profession have taken a very large part in the shaping of the "Code", which will (quite by coincidence) put a vast amount of business in their way, at least during the first few years of its life. Here, however, the layman and the very numerous body of Hindus with legal degrees can join hands and help to perfect their system of law. The curious relationship between the judges and the legislature needs to be understood and once this is grasped much may more speedily be done to remove the thorns which at present penetrate the skin of the "Code" at many places. The judges invariably pretend that they are interpreting what the legislature has said, and not what it meant, while on the other hand the legislature is inclined to utilise the judges' interpretations of what it has said as an excuse for not making its real meaning more clear. It is usually only when judicial interpretation leads to a notorious scandal that Parliament can be induced to bestir itself, and opportunities to revise private, and especially

family, law seem to come very rarely. The public can, by rapidly reviewing month by month the trend of decisions as reported for example in the *All India Reporter,* which has a very wide circulation, make sure that the effect of the "Code" is periodically brought to the notice of the Government, and that the amendments which are sure to come are not too fragmentary and not too hastily drafted. And readers in countries where their law is still uncodified may like to take a warning as well as encouragement from what has happened in India.

CORRECTIONS TO SECTIONS

The enactment of the Bills in some cases anticipated the author's objections to their previous Drafts, and accordingly and for similar reasons the reader is asked to refer back to this place at the sections indicated:

SEC. 1. The number of persons governed by the Code is probably not now above 330,000,000, seeing that the Scheduled Tribes have been exempted in all the statutes.

SEC. 4. The remedy now extends over the whole field excepting the Joint Family (where it has not been virtually abolished, as in Malabar law) and Religious Endowments. The latter, like Impartible Estates, is a section of the law which either has felt or soon will feel the axe from different directions.

SEC. 14. The number of impartible estates which may descend to a single heir has been drastically reduced by Section 5 of the Hindu Succession Act (see Appendix III).

SEC. 29. See Sec. 4 above. Sec. 31. As Sec. 29: most of the field is now redeemed substantially from the old system.

SEC. 39. The States Reorganisation Act, 1956, has substantially reduced the number of States and thus the number of High Courts and courts of comparable jurisdiction.

SEC. 49. The quality of the Hindu Marriage Act was not evenly reproduced in the subsequent statutes.

SEC. 83. Unchastity is no longer a bar to succession, though, curiously enough, in *some* cases re-marriage remains a bar!

SEC. 102. Further study has convinced the author that the Special Marriage Act, 1954, does not propose to subject to the Indian Succession Act more than the *first* generation of descendants

of a couple who marry or who register their marriage under the said Act of 1954, but there are authorities both ways.

Sec. 104. The Hindu Succession Act, 1956 became law with the President's Assent on the 17th June, 1956. Joint Family will probably not be dealt with, since it may be permitted to wither away. Adoption and Maintenance have been dealt with together (see Appendix III below).

Sec. 111. We shall have to refer to the old law for a definition of "illegitimate", "survivorship", "member of a coparcenary", "ceasing to be a Hindu", and "abandoning the world", to mention only a few more references. Customs relative to capacity to be adopted have been preserved in the Hindu Adoptions and Maintenance Act and their ascertainment will give rise to difficulties: see [1956] II Madras Law Journal (journal section) 97 & ff.

Sec. 147. See now Hindu Adoptions and Maintenance Act, 1956, Sections 18 and 23. It is to be observed that a husband cannot obtain separate maintenance from his wife; although he can obtain alimony from her in divorce proceedings.

Sec. 158. A close reading of Section 16 of the Hindu Marriage Act indicates that it was too hurriedly copied from Section 26 of the Special Marriage Act, 1954, with the result that many words are superfluous and misleading. The Section does *not* tell us that the children of a *void* marriage are legitimate for certain limited purposes, as it appears to say. The Section will have to be amended.

The Indian Divorce Act and certain provisions in other Commonwealth countries attempt to relieve children of marriages voidable, or void but contracted by the parties *bona fide.*

Sec. 209. Now no minor may be the guardian of the property of another minor, even his wife.

Sec. 213. The Act provides that these powers shall be exercised only by those entitled to be guardians of their children.

Sec. 214. See comment on Sec. 209 above.

Sec. 217. The Act, by omitting the offending clause, has obviated these objections.

Sec. 241. See comment on Sec. 217 above. The *duties* (as opposed to the powers) of Hindu guardians are still left very much at large.

SECS. 262, 263. Daughters may now be adopted by males as well as females. Children over 15, or married persons, may be adopted if a custom exists authorising such an adoption. An orphan can be adopted with the consent of his guardian and the Court.

SEC. 272. The guardian of an orphan may give him in adoption with the Court's consent. The Act does not permit the father to prevent his widow from giving in adoption (by mere prohibition).

SEC. 274. This must be modified, since some customary forms will be able to survive, now that the basis of statutory adoption has been widened in the terms of the Act of 1956.

SEC. 281. A man may adopt a girl, and a woman a boy provided that the difference in age between them is 21 years or more. If a daughter is to be adopted no Hindu daughter, or son's daughter (whether ritually disqualified or not is not considered) may exist already. This appears to be a mere copying, without substantial improvement, of the old provision where a son was to be adopted.

SEC. 283. Adoptions by women below 18 years of age are now prohibited. A spinster may now adopt, subject to the provisions of Section 8 of the Act (see Appendix III). The transitional provisions are omitted in the statute. We are now brought back to the position which probably existed far and wide before the British period, and which certainly existed until recently by custom in the Chettiar community, whereby each widow of a man might adopt a son to him—only now a child is adopted only to the adopter or adopting spouses. When monogamy becomes universal this transitional rule will disappear.

SEC. 285. This is now otiose.

SEC. 300. The Hindu Succession Act (in error—a result of cutting up the "Hindu Code Bill" into Parts) omits to enable adopted sons to succeed on intestacy. This has not been remedied in the Adoptions and Maintenance Act, with the result that where the *propositus* dies between the 17th June and the 21st December 1956 his adopted son is excluded. An amendment will be required, if possible with retroactive effect.

SEC. 301. Now all divesting is out of the question. When we are told that the adoption does not deprive the adopter of the

power to dispose of his or her property (Section 13 of the Act), we are left in doubt as to whether an interest in joint family property is contemplated: the matter is highly complicated. Probably no alteration in joint family law was intended.

SEC. 302. The Act as passed is certainly not a natural development: despite its archaic features it is a radical departure.

SECS. 310-13. See comment on Sec. 301 above.

SEC. 314. Now agreements cutting down the expectations of adoptees are permitted without limit. Thus the view taken in Sec. 317 has been anticipated.

SEC. 391. The difficulty referred to in this Section has been obviated by the creation of the State of Kerala by the States Reorganisation Act of 1956.

SEC. 411. This type of scheme is now enacted as a regular feature.

SEC. 419. The scheme of the Act shows some considerable divergence from that contemplated in the Bill, or from that contemplated in Section 30 (2) of the Hindu Succession Act, which is repealed by Section 29 of the Hindu Adoptions and Maintenance Act. In the interval of about six months between the respective dates of coming into force of the two statutes a type of Family Protection will be in force with reference to the estates of deceased Hindus. After the 21st December, 1956 the new scheme will operate, which has the following features (see Sections 21-28 of the Hindu Adoptions and Maintenance Act):—

1. A series of relatives (defined in the Act) are denominated "dependants". These are the parents, the widow so long as she does not remarry (but not the widower), legitimate and illegitimate minor son and daughter, legitimate son's son or son's daughter and so on to the next generation,* widowed daughter,* son's widow and son's son's widow provided she does not remarry*. The daughters are not dependants after they marry, even though they cannot obtain adequate maintenance from their husbands, but those marked with an asterisk are dependants to the extent that they cannot obtain maintenance [the word "adequate" does not appear in the Act, but see Section 3 (*b*)] from nearer kindred or their estates.

2. "Dependants" are bound to be maintained by the "heirs" of a deceased Hindu out of the estate. The meaning of the word "heirs" is not explained and we are in the dark as to whether a

will may be upset or not; but the wording of Section 22 (2) strongly suggests that it may since dependants are entitled to be maintained only where they have not obtained whether by will or on intestacy no *share* in the estate. It still seems on the bare words of the Act that a legacy of one rupee will adeem the right, but a Court will hardly decree a solution to this effect without grave misgivings.

3. The amount of maintenance is within the Court's discretion, and amongst the factors which the Court is directed to take into account is the amount of property or earnings to which the dependant is entitled or of which he is in receipt.

4. The rights of dependants are postponed to those of creditors "of every description". Does this open the door wide to testamentary contracts? The prospect is intriguing.

So much for the claims against the estate of a deceased person. The Act makes two provisions with regard to the living person's obligation to maintain. In the last resort (consistently with the foregoing) a widowed daughter-in-law may apply to be maintained by her father-in-law, and the old-fashioned rule reappears that she is liable to be maintained out of coparcenary property only, but it is provided that if she takes any share out of this, as for example (it appears) by her husband leaving her a legacy of a clock out of it, she is totally debarred. Next parents or unmarried daughters (but not minor sons, legitimate or illegitimate) cannot claim maintenance if their own earnings and other property would cover the periodical amount to which the Court believes them entitled respectively.

Doubtless this statute will be found to be in need of substantial amendment as time goes on.

ACKNOWLEDGMENTS

The majority of the works, without the aid of which this book could not have been written, are listed in the Select Bibliography. The reader whose curiosity has been stimulated by any discussion in the following pages may profitably refer to any or all of them. Works of an entirely controversial or tendentious nature have been omitted, though a few of these are referred to in an occasional foot-note.

Amongst modern writers on the *dharmashastra* the author is most indebted to Mahamahopadhyaya Dr. P. V. Kane, from whose remarkable freedom from prejudice the Select Committees benefited as much as from his unexampled erudition, to Professor K. V. Rangaswami Aiyangar, to Principal J. R. Gharpure and to Dr. Naresh Chandra Sen-Gupta. On the current Hindu law the works of Sri S. V. Gupte, Sri N. R. Raghavachariar and Sri M. N. Srinivasan have been found most stimulating. Sri I. S. Pawate's little book on *Dayabhaga* (entitled *Daya-vibhaga* and published by the author at Dharwar, 1945) is one of the most original and illuminating works on the *dharmashastra* and current practice in the joint family to appear in many years.

Reading alone, divorced from life and opinions, can be of little value in a context such as this. The author is gratefully conscious of the debt which he owes to many public men who have spared him their time. Amongst them he would specially mention the Prime Minister, Pandit Jawaharlal Nehru, without whose perseverance and faith the "Hindu Code" would never have reached the statute-book, Dr B. R. Ambedkar, Sir S. Varadachariar, Justice T. L. Venkatarama Aiyar, Justice P. B. Gajendragadkar, Justice N. J. Bhagwati, Dewan Bahadur Rajaratna V. V. Joshi, the Rt. Hon. Dr M. R. Jayakar, and the late Sri T. R. Venkatarama Sastri. To the kindness of Mr. Justice Vivian Bose (as he then was) he owes assistance and encouragement.

What fluency he possesses in making out the meaning of *shastric* texts may be attributed significantly to the skill and patience of Sri G. B. Palsule and to Sri K. G. Goswami Sastri. Recently his former pupil Sri M. S. Panigrahi, now of the Rajya Sabha Secretariat, most helpfully supplied material, and Sri G. R.

Rajagopaul, Additional Secretary and Chief Draftsman, Ministry of Law, has been unfailingly helpful.

Space does not permit the mention of all the author's more personal debts. The progress of this book through the Press gave rise to prolonged anxiety which could hardly have been borne without his wife's cheerful realism. And lastly, what perhaps should not pass without explanation, his interest in India must be traced to the treatment he has received from Indians; and Sri Govind K. Kulkarni, Sri Srinath V. Setlur and Dr. Nemai S. Bose know what that has meant to him.

J. D. M. D.

Lee Common, Bucks.
March, 1957.

ADDENDUM (See pp. 105 and 326)

The necessary series of amendments to the "Code" may be said already to have commenced. By Sec. 2 of the Hindu Marriage (Amendment) Act, 1956 (Act 73 of 1956), which came into force on the 20th December, 1956, Parliament substituted for the words "immediately before" in Sec. 10 (1) (*d*) of the Hindu Marriage Act, 1955 (see p. 326 line 30 below) the words

"for a period of not less than three years immediately preceding",

thus correcting a slip which transpired between the introduction of Bill No. 7 of 1952 in the Council of States (as it was then known) and its passing in that House three years later. The correction renders it likely that in every case where proceedings are commenced on the ground of the respondent's suffering from this complaint a genuine attempt to effect a cure thereof will have been made.

TYPOGRAPHICAL ERRORS

On p. 5 for 1947 read 1949
„ p. 14 l. 33 for litigous read litigious
„ p. 24 l. 23 for nor read or
„ p. 27 l. 23 for good read Good
„ p. 57 l. 25 for Committe read Committee
„ p. 78 l. 28 for developments, read developments,[7]
„ p. 85 l. 11 for welfare read welter
„ p. 98 l. 5 for chance read chances
„ p. 116 l. 20 for un-heard read unheard-of
„ p. 132 l. 3 for minor read minors
„ p. 205 l. 16 omit the word no
„ p. 213 l. 19 for to read from
„ p. 301 ll. 9, 10 for 59 Bom. L.R. (journal read 20 S.C.J. (journal) 85 & ff.
„ p. 331 last line for bigmay read bigamy
„ p. 337 l. 21 for 1953 read 1956
„ p. 229 l. 25 for son's read sons'
„ p. 232 l. 26 for whether read where
„ p. 234 l. 5 for bhartidatta read bhartridatta
„ p. 235 l. 2 for bethothed read betrothed
„ p. 235 l. 23 for karama read krama
„ p. 236 l. 6 for brother's read brothers'
„ p. 236 l. 9 for daughters read daughters'
„ p. 237 l. 18 for 7 read 6 and so throughout the Section
„ p. 258 l. 31 for sex read sex,
„ p. 259 l. 21 for Aliyasantana read Aliyasantani
„ p. 263 l. 12 for traditional read traditional,
„ p. 263 l. 16 for advantage read advantage,
„ p. 281 l. 19 for be outside read be the outside
„ p. 285 l. 15 for have read have been
„ p. 287 l. 19 for renewed read reviewed

CONTENTS

L

CHAPTER 1

THE PROBLEM

1. *The size of the problem.*

1. When the last of the Bills which go to make up the "Hindu Code" becomes law that "Code" will apply to nearly 400,000,000 people. At this moment "Hindu Law", more or less modified by Custom, is applicable to about 320,000,000 people in India alone, and eventually the total will be swelled not only by the natural increase in the population but by the gradual inclusion of the Scheduled Tribes within the pale of the general Hindu Law. The accepted policy in their regard is to exclude them from provisions which are plainly unsuited to them in their present state of civilization but to admit them as soon as the social and economic changes which are already being felt amongst some of them force them to a point of development where they cannot practically be privileged any longer.

2. Excluding these Scheduled Tribes for the moment, let us consider the remainder, whose Hinduisation has progressed sufficiently far, or has never been in doubt, so that the courts subject them to the Hindu Law. A less homogeneous conglomeration of Mankind it would be difficult to imagine. It is difficult at times for the court to decide to whom the word "Hindu" should apply for this purpose (see sec. 107 below), but when that hurdle has been surmounted we find the Hindus to be as diverse in race, psychology, habitat, employment and way of life as any collection of human beings that might be gathered from the ends of the earth. Semi-nomadic herdsmen and gypsies,

world-famous dancers and exquisite poets; stone-breakers and Supreme Court judges: dwellers in huts rudely fashioned of reed mats and denizens of luxury flats; sweltering in a loin-cloth and shivering in dense furs: from desert Rajasthan to humid Malabar and from the frozen Himalaya to the relaxing Bengal: from primitive animists to the subtlest *advaitins*; from those who trace kindred through the father, through both parents, or through the mother only to those who recognise no kindred at all: all these can be subject to Hindu Law. Besides these divergencies, which most educated town-dwellers are apt to minimise, the mere fact that Hindus speak languages belonging to several linguistic groups, examples of which are not mutually intelligible, is almost insignificant. The Swiss managed to enact a Civil Code despite the three languages of their peoples; but they were all united by fundamental conditions of life, if by no other common feature.

3. Yet, as public speakers are fond of saying, there is a unity amid this diversity, and it is not mere geographical Indianness which makes the Hindus—any Hindus—different from all other peoples. For all are in some measure heirs to a civilization of immense antiquity and unrivalled continuity. The words "cultural heritage", which have been repeated *ad nauseam* by patriots, not all of whom know what it really is, are not really empty of meaning. Perhaps the visitor is more aware than the resident of features held in common by all Hindus: even the most sophisticated—provided they have been brought up in a Hindu society—share the common features which are indiscernible to the eye or ear, but which nevertheless motivate and control those that have them. There is a reality and a permanence in all Hindus of certain fundamental beliefs about the nature of life, the individual's

place in it, his essential relationship to his kindred, his caste-fellows and his neighbours, and the consequent duties which and which alone life can demand of him. Economic conditions may change, new ideas may be welcomed and naturalised, adjustments of many kinds necessarily accompany the alteration, but the psychological background and mental furniture of even a western-educated Hindu will remain, by and large, true to his type and his inheritance. Individuals may not be aware of this, and may be more acutely conscious of the differences between caste and caste, tribe and tribe, community and community; this is because at the moment of consideration they may be more impressed by the formal than by the substantial, the superficial than the essential. The observer must not allow the outer garb to mislead him as to the nature of the inner spirit. Law itself, of course, partakes at once of both characters. Both must be correctly attuned if satisfaction is to be obtained. Upon this duality of law much could be written which present space does not permit. Let it suffice to assert that a comparison of various systems of law reveals, on the one hand, the great diversity of methods and practical approaches, and on the other the essential unity and identity of the institutions and of the objects at which they aim everywhere. Realisation of this fact helps the lawyer who, knowing the great diversity of the present position, sets himself the task of criticising the proposed legislation that should unite all. It helps the legislator who, desiring unity, wonders whether it will be sacrificed if forms and expedients are not unitary and invariable.

2. *What is the Hindu Law like to-day?*

4. The private law of the Hindus is one of the most complicated in the world. No system of law is, or has

ever been, in such almost inextricable confusion. It is doubtful whether any living person knows the depths of the chaos into which centuries of neglect and indifferent administration, of historical aberration and fortuitous error, have thrown it. It was once theoretically capable of being a magnificent system of law, superbly equipped with every feature, substantive and adjective, that could be required by a people desirous of the very best administration of justice and the most subtle jurisprudence. In one chapter of the law a substantial remedy has been applied already by the enactment of the Hindu Marriage Act, 1955.

5. During the period which began in the latter part of the 18th century and ended in August 1947, when the administration of justice in about one-half of the undivided India was subject to the enactments of the British Indian legislatures and the supervision of the Judicial Committee of the Privy Council in London, the foundations of our modern Anglo-Hindu law were laid. During the last half-century numerous learned Hindu ex-judges of Indian High Courts have been members of the Board of the Judicial Committee, and even before their membership it was regular for the Board to consider itself an Indian court in hearing Indian appeals, and the non-Indian members were frequently ex-Chief Justices of Indian High Courts. Had the Privy Council not exercised its jurisdiction over all the Governors' Provinces and other parts of the former British India the confusion which now reigns in Anglo-Hindu law would be infinitely worse. For although, despite the experience which the Judicial Committee could call upon, the Privy Council is known to have made some shocking mistakes—some of which it was fortunately able to recover without excessive delay, it is certain that it helped to pull together the slack strands of

law which were developing independently among the High Courts of Calcutta, Madras, Bombay, Allahabad. Nagpur and so on. Where lines of decisions in the North and South were irreconcilable the Privy Council did not fail to admit this, but such consolidation as was achieved is due to that final court of appeal's discretion and authority.

6. The mantle of the Privy Council fell in 1947 upon the Federal Court and now the Supreme Court exercises the final appellate jurisdiction for India. Where the Supreme Court has thought fit to adopt and follow Privy Council decisions of long standing,[1] those decisions still bind the Indian High Courts. At times the Supreme Court has expressed dissatisfaction with parts of the *ratio* of Privy Council judgments, and has substituted a law which, in its opinion, better expresses the tradition of Indian cases. It has been held by a High Court[2] that Privy Council decisions are not binding upon High Courts any longer except in so far as they conform to a view of the law which would naturally and reasonably be deduced from the Indian case-law which the Privy Council had before it as its raw material. In other words it is possible now for the High Courts to diverge at will from the unified judicially interpreted case-law which once kept all the High Courts together, unless the Supreme Court has adopted a relevant Privy Council decision in one of its own decisions. Thus, for a time at least, confusion will deepen rather than the reverse.

7. There is a brighter side to this picture since the Supreme Court's decisions are binding on all the High Courts and other courts of the Indian Union. Previous to the inauguration of the Indian Constitution the chief Courts of Princely States such as Baroda, Travancore, Cochin, Mysore and Hyderabad had been free to follow

their own interpretations of the *dharmashastra,* which, as we shall see, is the formal source of the modern Hindu Law. In the majority of cases they found it convenient to follow the British Indian High Courts, but in very many cases, often of the greatest importance, they followed opinions totally opposed to the Privy Council rulings. These distinct traditions have not as yet been suppressed by the Supreme Court, but the Mysore High Court has already voluntarily accepted the submission that Supreme Court decisions on appeal from a former British Indian High Court are binding in all parts of India,[3] and it is likely that in due course all the other Part B States' High Courts will follow this example. Thus a valuable unification will take place, at the unavoidable cost of dislocation in the diverging States in question. The precise limits of the Supreme Court's power to state one Anglo-Hindu law rule for all India are as yet unknown.

8. Apart from the divergencies between the High Courts which are likely to be diminished by the influence of the Supreme Court,[4] certain other divergencies may be removed by the voluntary action of the individual High Courts, bringing their anomalous views into line with the view of the majority. This has already happened in a few cases.[5] But the scope open to this sort of adjustment is very limited, because of the operation of the rule of precedent (*stare decisis*) which it is generally in the public's interest to hold to, leaving it to the legislature to make the necessary adjustments which it is more competent to do than a court faced with a particular, and perhaps a narrow, dispute.

9. Though the High Courts still delight in their independence of each other, and blissfully choose whether or not to follow the views of another High Court or "respectfully" to dissent from or "not follow" them, or,

on the other hand, "approve" them, this is not the end of the problem. In some matters local legislation has created rights which are not in existence elsewhere. This may have thrown out of balance the whole of the Anglo-Hindu law on the topic in question in that State or States. Even Central legislation is not evenly effective in all the States of the former British India,[6] not to speak of the former Princely States, some of which have elaborate legislation on Hindu Law of their own.[7] In a day's journey one may pass through jurisdictions where three or four sorts of "Hindu Law" are applicable to the same category of Hindu.

10. Except where statutes (which cover but a small section of the field) exclude the right, it is open to any Hindu to prove that the Anglo-Hindu law does not apply to him in respect of a matter which he claims is provided for by a valid Custom binding upon him. Proof of Custom is not in fact very easy, but numbers of such Customs have been judicially recognised and in some cases judicial notice is taken of a widespread Custom.[8] Clear proof of usage will outweigh the written text of the law: this well-known rule,[9] when combined in the picture with the facts stated above, makes it impossible to predicate with certainty of any two Hindus seen walking in any village or town in India that they are governed in all matters by the same law.

11. This would not be so intolerable if we could say with certainty what the law *is*. Not only are we in great difficulties in attempting to give expression to our conception of the law in any given jurisdiction, but we are really in doubt as to whether the law itself *exists* in an expressible form. Whatever is known about the law is a hotch-potch of rules, often inconsistent with one another, ill-assorted, mutually incompatible, intellectually lacking in uniformity,

unsatisfying. As already mentioned, there is never any security, since a long-asseverated rule may disappear overnight with the publication of a High Court or Supreme Court judgment. Encumbered with rules which do not govern, principles which do not guide, maxims which are ambiguous, sources which may be followed or not at choice and rules of interpretation which are as flexible as the sources upon which they are supposed to throw light, the system—if it deserves the name—is unlike any other now in force. Like drowning men clutching at straws the jurists emphasise features, scraps of the law which appear to be certain, only to find that a Court they cannot ignore has decided something utterly incompatible with what had been so confidently stated until then.

12. As for uncertainty: large numbers of problems have not been covered by decided cases. Many of these turn out, upon reference to the sources, to be incapable of solution except by desperate and often intellectually dishonest expedients. The very background to groups of separate decisions within a single chapter of the law is open to question. When the Supreme Court, or even a High Court, has to decide a trifling point it is usual for it to sift through a mountain of case-law emanating from various parts of India and the Privy Council in an endeavour to detect underlying principles. When at length something has been achieved it is with the constant fear that the *dicta* will be used to justify an unimaginable variety of submissions on all sorts of irrelevant topics coming roughly within the chapter under review in that case. On technical grounds alone many decisions, regularly followed, are patently unsound, but no one tries to upset them. *Communis error facit jus* is the only justification behind many a hoary rule: it is too old to be reconsidered!

13. Why is there so much uncertainty as to the fundamentals of the subject? The answer to this question cannot be obtained without a rather lengthy journey into history. Ever since the famous Bengal Regulation of 1772 by which the laws to be administered in the East India Company's courts in disputes concerning succession, marriage, caste, etc., were "those of the Shastras with respect to Gentoos", the ultimate authority of law, when the topic of the dispute fell within the scope allowed to the personal system of law, has been the *dharmashastra*. The *dharmashastra* meant then, and means still, that body of jurisprudential learning which is still preserved by a few *pandits* and recoverable from the vast mass of legal literature in Sanskrit composed by such *pandits* in the past millennium or so ; accepting as correct a view acceptable to *pandits* who have been adequately trained and who have access to all the best treatises on the point in question. It is the indigenous system of law which was largely superseded by the Common Law and Equity and eventually by the Indian Codes and the rest of the Central and State legislation of India. Not a few of the defects from which we suffer at present are due to the nature of the *dharmashastra* which the courts are bound by statute to follow. It is only where the *dharmashastra* cannot be made to yield the answer that Justice, Equity and Good Conscience, that is to say the Common Law of England,[10] may be applied by the judges.

3. *The shastric element.*

14. The *dharmashastra* is a complete science, like any other *shastra*. The system contained in the very extensive literature covers all aspects of law, as well as of ethics and morality. The two are not kept very distinct, though writers from time to time choose between a rule

which ought to and one which need not be enforced by the courts.[11] That part of the system which is known as *vyavahara*, or court-law, was administered in pre-British and very early British times, but the enactments retained only a few of the topics which were thought to have a very close connection with Hindu religious beliefs and intimate social habits. The procedural law, contract (or nearly all of it), torts and criminal law for example were all replaced by foreign rules, which were thought to be more just and more practicable to enforce. The *shastra* itself was left in command of the field in relation to matters of marriage, adoption, maintenance, the joint family, minority, legitimacy, succession, religious endowments, caste privileges—in fact the private law of the Hindus. This fact is responsible for the scope of the "Hindu Code Bill", which deals with Marriage, Divorce, Adoption, Maintenance, Joint Family and Succession and Minority and Guardianship. The law of impartible estates, which is part of the law of succession, is excluded, since such property is rapidly becoming rarer by the operation of expropriatory legislation; the law of religious endowments is omitted because not only the individual States but also the Centre propose to deal comprehensively with public trusts of all denominations: and the law of castes is also largely covered or about to be covered by local or central statutes at least so far as concerns excommunication and untouchability and kindred matters.

15. The *dharmashastra* itself differs from the English law with which it has to consort as chalk from cheese. The esoteric technique, which is quite peculiar, was understood by only a handful of British officials, for example Colebrooke, Ellis, Burnell, and, to some extent, Strange, and their prejudice in favour of their own technique was so strong that they did little to encourage others to become

acquainted with the *shastra*, which in those days was somewhat more difficult to master than it is to-day.

The technique itself was the same in A.D. 1800 as it had been in A.D. 500. It was a natural development of a process of determining the law to be applied in litigation by reference to established authorities. These authorities were not merely centuries, but in some cases millennia older than the writers who had, comparatively recently, investigated the topics in question : they were written in language which was often vague and sometimes unintelligible. They were compiled for purposes which might not include the point under examination, and they were written for a public long vanished, sometimes without distinct trace.

16. It was perfectly reasonable that lawyers referring to such authorities should not be permitted to interpret and apply them according to their fancy. Their opinions were accepted and put into effect only in so far as they were demonstrably dependent from accepted commentaries. The commentaries themselves were the work of experts, some of whom have been dead a thousand years, who set out to explain either certain chapters or the whole of the law upon consistent principles. Most of these experts had an incidental motive of stating the law from the authorities in a manner which would be least unacceptable to and least inconvenient for the local public with which they were themselves best acquainted. They had some fundamental regard for public opinion, though they did not give it a high place—still less was it a genuine source of law. Local customs however did influence the interpretation of the authorities : that is to say, wherever the science of interpretation, the *nyaya-shastra* or *mimamsa-shastra*, allowed a meaning to be placed upon the words or a reconciliation of conflicting texts which would favour a particular custom.

The commentaries, of which our surviving examples, called either *tika* or *vritti,* date from about A.D. 600 to about A.D. 1800 were supplemented by three further types of legal composition. A very valuable work was a *nibandha*, or "digest", in which the author culled from the authorities texts which he regarded as best expounding the points at issue, and he stamped these as not obsolete, genuine and binding in the form in which the matter was written. By this treatment a quantity of superfluous or confusing texts could be excluded without loss and the law under any given head could be read at a glance. Where texts of good quality appeared to be inconsistent the manner in which they were arranged indicated the relationship which the author of the digest felt they should bear to one another. Where necessary he added notes of his own to explain difficult words or point out the true meaning of an ambiguous passage. *Nibandhas* range in date from the work of Halayudha (about A.D. 800) to one of the last kings of Tanjore, who died in the last century. *Samgrahas* or metrical digests written in the *samgrahakara's* own words were once popular but they were bound to be comparatively ephemeral. *Mula-granthas*, specialised original treatises on particular topics, have mostly retained their value, and Jimutavahana on Inheritance, Nanda-pandita on Adoption and Anantarama (attrib.) on Property are still capital works on *dharmashastra*.

17. The views of these jurists naturally varied greatly, and Easterners, Northerners and Southerners tended to differ on certain very broad points. The differences were not in essentials, though doubtless they tended to reflect local preferences in practice. Individual suggestions were often not taken up by later writers, and masses of learning have fallen by the way-side. Later authors, as is the case with other sciences, often mention previous writers only

to reject their views, and such mention is sometimes all the evidence we have of the ancient jurist's activity. A good author, one who was worthy to be followed, invariably coped with the theories and interpretations of all his predecessors and in this way the *shastra* was kept alive and moving, albeit at a somewhat slow pace. A writer who did not deal with every known viewpoint would suffer literary death, since the appearance of later and more comprehensive treatises would diminish the chances of his work's being copied.

18. The technique of dealing with the authorities themselves was bound to be artificial since the whole method, in the interests of its own survival, depended upon certain irrebuttable tenets and assumptions. Of these the chief was that the Veda was the source of all law as it was the source of all knowledge. Thus all the texts of the ancient sages bearing upon our subject, texts denominated *smritis* because they contained the "remembered" wisdom of the civilization, must be authoritative because they are based upon Vedic authority. Either a text of the Veda was the formal source of the rule, which was very rarely the case,[12] or the *smriti*, being composed by one who had access to the whole Veda, of which we possess only fragments, must have expressed in practical form a rule found literally or derivatively in some lost Vedic text. All *smritis* were true and binding, and there could be no contradiction between them. The apparent contradictions were in fact soluble by interpretation, and ingenuity was stretched to its limits to achieve a solution. The doctrine called *ekavakyata* insisted upon the jurists' coping with *every smriti* having any bearing upon his topic, and reconciling the whole.

19. No *smriti* text might be abandoned unless (*i*) it were found to apply to another, previous, *yuga* or age of

Man or (*ii*) it were *loka-vidvishtha*, that is to say abhorred by the public at large. Reason (*nyaya*) had its part to play in manipulating the sources of law, but it was not itself a source. The boundaries of the law were in theory absolutely fixed and no new development could be stimulated by the entry of new material from without. In practice this theory gave the system an appearance of rigidity which was quite misleading, since evidence of development and adjustment through the centuries is unquestionably to be found.

20. The content of the *smritis* themselves is of interest since they are still indirectly (and sometimes even directly)[13] the source of the Anglo-Hindu law. They were compiled by great jurists of the period stretching from about 800 B.C. to perhaps as late as A.D. 200. An alternative and plausible theory would place the original compositions rather earlier, but admit that subsequent editing had added numerous spurious stanzas and altered the wording and meaning of others. The original writers were catering for Hindus living between the Vindhyas and Taxila, and from Sindh to Kamarupa. It is possible that Hindus even south of the Vindhyas were catered for, but this is not certain. The earliest works, the *dharma-sutras*, bear unmistakable traces of being compilations from amidst a welter of customary laws, upon which the authors brought to bear a selective acumen sharpened by doctrinal and scholastic enthusiasm. Orthodoxy's beginnings go back as far as the end of the Vedic period itself. The great brilliance of the early *shastrakaras*, of whom Manu was the most eminent, gained not only implicit faith for his doctrines but also a cloud of imitators and plagiarists.

Many of Manu's followers emphasised the litigous aspect of law and gave many more details than Manu

gives us. Some scholars think that the *smritis* can be divided into historical ages, and see, as is no doubt possible, traces of each age in the habits of (mostly) backward peoples in India to-day. But the *shastris* and *pandits* will not admit this approach at all. For the orthodox attitude towards the *dharmashastra* involves a rejection of the speculations of historians: all the *smriti* texts relate to the same era and epoch unless we are otherwise informed, and that era is our own ; all the texts are applicable in one and the same sense and the apparent discrepancies in approach and content relate not to differences in antiquity but to differences in expositional technique. This attitude on the part of the orthodox is of course a patent sham, because when we examine any *smriti* we become aware that very many rules which were once valid have since, through the efforts of commentators and digest-compilers, been relegated to the juristic shelf. The *dharmashastra* had gone on unifying and becoming more and more concrete, and the *shastris* have mistaken the aim and the goal for the commencement. But then they do not admit a commencement, for the *dharma* which the *shastra* expounds is supposed to be eternal.

21. When the British Courts came to expound the *dharmashastra* they naturally followed the previous practice to the extent of leaving the determination of a point of law to *pandits*, the Hindu Law Officers attached to the Courts themselves. Subsequently, when the body of case-law had been built up to an extent where it was possible to assume that the judges themselves had a sufficient knowledge of the general principles of the subject, and when a few of the more authoritative text-books had been translated into English, the Hindu Law Officers were discarded and the Court continued to administer Hindu Law of itself. At once a choice arose: should the Court

attempt to find out the meaning of the *smritis* or should it rely upon the interpretation given to the relevant *smritis* by a recognised commentator whose book was commonly resorted to by the local *pandits*? The Privy Council gave the answer:[14] the meaning placed upon the authorities by the commentaries is the meaning which binds the court. From this very rational pronouncement two effects followed. Firstly the courts adopted certain commentaries as particularly binding and did not concern themselves to have access to other *dharmashastra* literature, a step which tended to fossilize the law, especially when a very old text was chosen to the exclusion of later commentaries which improved upon it in some respects: and secondly they tended to regionalise commentaries, deprive them of effectiveness outside the arbitrary boundaries which were carelessly laid down in the early nineteenth century. The *Mayukha* of Nilakantha, for example, though of use potentially throughout India, is not listened to in Madras, nor the *Sarasvativilasa* in Bombay. The crippling character of these effects can be imagined when the additional fact is borne in mind, namely that until very recently hardly a third of the relevant *shastric* material was available in print, and of that hardly a half has ever been translated into English. The stress which that fact alone places upon the texts which have been translated is phenomenal, and much to the disadvantage not only of the unfortunate authors of those commentaries, but also of the public who have a right to have the whole law and nothing but the law administered to them.

22. And thus it comes about that the *dharmashastra* as administered by the courts (where it is administered at all) is a very different thing from the *dharmashastra* which lives amongst the *pandits*, and to some extent amongst

pious Hindu laymen in our day. The *dharmashastra* of the historians and comparative lawyers is apt to be a third entity, not sure of a hearing in the courts but certain of being rejected by the public, if we except the "reformers" and some of the western-educated Hindus who are ready enough to utilise it for the forwarding of their schemes of social reform. These very well-meaning gentlemen will not hesitate to quote a text of Manu or Narada which undoubtedly occurs in the source-material of the *dharmashastra,* oblivious of the fact that it has ceased to have any *effective* authority for many centuries! Misunderstandings of this sort have bedevilled the "Hindu Code Bill" controversy to such an extent that agreement upon ordinary rational lines has seemed to some observers to be almost hopeless. From the practical standpoint the reunion between the Court's *dharmashastra* and the *pandits'* *dharmashastra* is now impossible, because of the fact that the system has been administered for so many years under the aegis of the English legal system, transplanted and naturalized on Indian soil.

4. *The naturalized English element.*

23. Not only the manner of administration but even some of the rules themselves of the Anglo-Hindu law owe their origin to the Common Law and Equity which were brought to India by the judges of the East India Company's and the Crown Courts. Certain gaps were discovered to exist in the *shastra.* In some cases these were genuine gaps due to the *shastra-karas* not having contemplated every eventuality which transpired in the eighteenth and nineteenth centuries; but some were not genuine gaps—they only appeared to be gaps because the relevant rule was hidden somewhere in the texts, hidden either because the judges could not find it where they

expected it to be or because it was to be found in an untranslated text.[15] The supine attitude which the courts took during the greater part of the nineteenth century towards the challenge presented to them by novel points of law, for which an obvious solution was not available in the translations published in Whitley Stokes' collection, is very strange when looked back upon to-day, when judges are prepared to enter upon a lengthy piece of research to find out the facts. Their excuse must lie in the fact that very few advocates were competent to examine the original sources and those that were could not obtain copies of the needful texts. Yet the production of a work like Jagannatha's *Vivada-bhangarnava* at the commencement of the century shows that not only the learning but also the materials were to be found by those who desired to enquire into them.

Equity found its way in generally in order to provide remedies where the *shastra* might have denied them, and to supplement the *shastric* law in answer to public demand. An outstanding example of this is the right allowed to a coparcener, that is to say a male owner of an interest in ancestral and joint family property, to sell or mortgage his undivided interest. This would have astonished the *shastra-karas,* who might not have comprehended the alienability of an interest of that character, but it served a useful purpose in South India where commercial classes often needed a means of raising funds without necessarily separating from their family.

24. The Common Law was applied under the title of Justice, Equity and Good Conscience, which the courts were authorised to apply in defect of a rule of the *shastra.* In some cases we find the judges invoking "natural justice" and even the Roman Law, where it seemed more suitable

than the English Common Law.[16] Frequently Justice, Equity and Good Conscience has been baulked when the Common Law has provided no acceptable rule, and on occasions it has sent the judges back to some other title or aspect of the Hindu Law itself. This has produced curious results. Some judges have thought that rights of inheritance for illegitimate relations were in accord with Justice, Equity and Good Conscience; some on the other hand have thought just the reverse. The same system has been invoked in connection with *devadasis*, and has even foisted Mitakshara (patrilineal) principles upon a Marumakkattayam (matrilineal) property-dispute.[17]

25. More serious than the doubts and confusions emanating from this source is the effect of the rule of *stare decisis*. The *dharmashastra* was originally administered by judges who considered themselves entirely free to administer the law in each fresh case according to the sources which were actually applicable. They did not have to regard rulings of an appellate tribunal, and there was no penalty for deciding two similar cases in a different manner. In other words no authority was given to any judge, however eminent, either to settle or to originate law. Once the *dharmashastra* came to be studied by advocates in the same spirit as the Common Law and Equity, the law being derived from the decided cases instead of from the principles inherent in the *dharmashastra* itself, a fatal confusion was bound to ensue. That confusion is none the less pernicious for its being extremely subtle. For in the case of topics like Tort, or like subjects covered by Indian statutes, there is no harm in the profession treating the law as derivable from the recorded cases (where, at least, there is not an uninterpreted statutory provision which can confound the argument). This has always been

the English technique. It is ably expressed by Lord Asquith of Bishopstone[18] in these words:

> "Nor, speaking more generally, does English jurisprudence start from a broad principle and decide cases in accordance with its logical implications. It starts with a clean slate, scored over, in course of time, with ad hoc decisions. General rules are arrived at inductively, from the collation and comparison of these decisions: they do not pre-exist them."

But the authority behind the Anglo-Hindu law was and still is (excepting Marriage and Divorce) the *dharmashastra.* That system consists above all things in general principles applied as occasion demands to individual problems. The advocates thus turn up their precedents and arrange their arguments upon the usual Common Law pattern, only to be told that the ultimate source cannot be abrogated by judicial decisions unless these are so old that they are saved by the (English) maxim "*communis error facit jus*". The twin sources consisting of the *dharmashastra* and judicial decisions, good and bad, thus struggle with one another, and in many cases the outcome of the battle is doubtful until the last. Hence the many head-on conflicts between the High Courts on what the layman would regard as perfectly simple problems of law. The two techniques go ill together in the same head, and the difficulties of the judges exceed anything that can be experienced in Europe.

26. The safety-valve, of course, is legislation. This is accepted without question by the average Indian to-day. But the legislature had no power at all according to the *dharmashastra,* except to make directions of a morally indifferent character, or to inculcate the doctrines of the *dharmashastra* itself. The "orthodox" would have us believe that the legislature had only derivative powers,

since Right and Justice were laid down for all time by the sacred texts. Compromise between these two viewpoints seems to be impossible. Fortunately it is not required for most practical purposes. But it should be noted that it is seldom appreciated that the relationship between the English regard for precedent and the attitude towards and availability of legislation in England, a close and functional relationship, is not reproduced in India, however much Indians may have grown used to the English manner of administering justice and the doctrine of the supremacy of Parliament. For there does not exist in India that easily organisable public feeling which promptly acts when a judicial decision is unsatisfactory. Nor is the law developed in the Courts part and parcel of the social awareness, the common conscience of the people, for indeed there does not exist a homogeneous people which can, in any given problem, return a single reply. Even the feeling of diversity to which I have referred (sec. 3 above) helps to hinder the articulation of a public outcry against an unpopular judicial decision.

27. Legislation, first under the guidance of English lawyers and then in response to educated Hindu demands, has radically altered the *dharmashastra* applicable in the court in several ways. In practice the Hindu Widow's Remarriage Act, 1856, and the Caste Disabilities Removal Act, 1850, have been among those most remarkable. Widows were allowed to marry, notwithstanding the impossibility of this according to the *shastra*; and persons disqualified from owning property or taking shares in an inheritance were relieved by the second statute, whose work was completed (except in Bengal) by the Hindu Inheritance (Removal of Disabilities) Act, 1928.

Nor would it be correct to assume that legislation alone has altered the Hindu Law applicable by the courts.

The courts themselves have done away, sometimes on a slight excuse, with several notorious *shastric* rules, such as that an acquisition of immovable property became at once inalienable without the consent of coparceners born of the acquirer; that an eldest son or an only son could not be adopted; that a person renouncing property in a joint family might renounce his issue's interests as well as his own but must take some article to estop himself and his issue from disputing the partition: and, most remarkable of all, that all property separately acquired by a coparcener would pass on his death by survivorship to his surviving coparceners. This is not a complete list, which, if it were worth compiling, could be compiled, though not without other assistance, from the chapters that follow.

28. Difficulties in establishing the *shastric* rule in a modern Anglo-Indian court have already been referred to; the difficulty of proving customs in derogation of the Hindu Law is another outcome of the adoption of a foreign system of jurisprudence in India. Many customs which were genuine enough failed to obtain the court's *fiat* because either continuity, or obligatory character or invariability or length of observance were incapable of being proved. The theory that the Hindu Law governs all, except those who can prove a valid custom in derogation of it, effects quite a different situation from that contemplated by the *shastra-karas,* who would accept any custom provided that it did not run counter to the Vedic authority or fundamental *shastric* rules, and would allow communities as a whole to be governed by their customs to the total exclusion of the *dharmashastra* where the two conflicted. On the one hand certain customs would not have been admitted at all, while on the other hand, once admitted, customs would secure the whole field for themselves.

29. This result, this astonishing mixture of antique and modern, this hotch-potch of sources and materials, this uncertain conglomeration of authorities, this patchwork with many rents and holes—this box full of surprises and unforeseeable decisions, shocking and annoying by turns—this is the Hindu Law, the only Hindu Law which Pakistan and Burma know, and the only Hindu Law known in India except in that small and only partly-charted oasis, the law of Marriage and Divorce.

30. No doubt it can be said in its favour that, compared with the situation in pre-British India, we have much to be thankful for. Law Reports (all too voluminous!) are available, statutes may be read (though not always understood) by all. There are means—though difficult and expensive—of making a fairly good guess in the majority of cases, what decision a given court is likely to arrive at. There is some uniformity throughout India and the same books will have almost the same authority in most of the High Courts. A practitioner from Madras will be quite at home in the Supreme Court in Delhi. Text-book writers and commentators are perpetually busy clarifying obscurities and exhorting the courts to mend their ways. The courts not infrequently tidy up a small grubby corner of the law. Progress can be observed. But the point of view of the "reformers" is that it is by no means fast enough, and it is bounded by limits which only Parliament can remove. For people at large, especially those in a position to know the extent of the faults, are very dissatisfied with the present position.

5. *Dissatisfaction with the result.*

31. The rules of the current Hindu Law do not keep pace with present-day needs ; the institution of caste is perpetuated and anachronistically upheld ; the mass of

rules present an unintellectual collection, morbid and automatic, not reflecting the social consciousness, uninspired, indifferent to the public's striving for the ideal: they allow on the one hand too great a diversity of custom among Hindus and on the other they enforce doctrinaire rules upon persons who despise the doctrines; there is a prevailing uncertainty which the existing body of knowledge does not seem to be capable of making good; the rules in some instances lend themselves to the perpetration of legal frauds: the public regards the law as a mystery, an expensive and tedious mystery (one Hindu Law matter was disposed of by a High Court—and thus not finally—recently twenty-six years after the cause of action arose), which can be indulged in only by those who can afford to engage someone to search the hundreds of volumes of reports and the almost equally voluminous *shastric* materials: all these complaints are heard against the current system. Marriage and Divorce has only just escaped, but it comprises but a fraction of the whole. All these complaints deserve a few lines of expansion.

32. Present-day needs are said not to be adequately served by a system which does not allow widows either to inherit their husbands' property in every case, nor when they have inherited to dispose of that property freely: which does not allow couples to choose their own marriage ceremony: which refuses an illegitimate daughter rights of maintenance: which saddles the ex-concubine of a family man upon his family after his death; which excludes legitimate daughters from succession to their fathers in the presence of their brothers: which denies orphans the right to be adopted: which places a sister at a remote distance in the order of intestate heirs: and finally which prevents the manager of a joint family from opening any new business. Opinions may and do differ

as to the extent of the discrepancy between the current law and the public's needs, but all are agreed that a substantial discrepancy exists. Piecemeal, patchwork legislation only draws attention to the fundamental weakness.

33. It is said that caste, which has been condemned in the Constitution, and which is no longer to be regarded in any secular matter, is perpetuated by the current Hindu Law. It is true that the bar against inter-caste marriages has been removed, but regard for caste must still be had in determining the rights of illegitimate sons; whether an adoption has been validly made; what shares an adopted son takes in a partition of his father's property between himself and an *aurasa* son; the rights of a step-son to the separate property of a woman and certain other matters. It is the case, unfortunately, that when inter-caste marriages were revived by Central legislation the old law concerning the shares at a partition between the sons of a man by wives of different castes, a law which had been almost completely obsolete for nearly seven hundred years, was brought back to life. All this is quite unnecessary and out of accord with modern needs, except in the view of the "orthodox", to whom the caste-system still stands for a natural phenomenon of spiritual significance.

34. The totally uninspired nature of the present collection of rules, and the deep divorce between them and the public consciousness could not be better revealed than by the constant discrepancy between the views of the various High Courts on identical topics. Attempts to bring the law into closer touch with current ideas of justice are constantly being made by judges, but the success of such efforts must always be limited. Authorities can be dug up from the remote past, and antique legal theories are ventilated unexpectedly to justify decisions which might more convincingly be reached upon more relevant

grounds. The formal very frequently takes the place of the substantial : and the worst of it is that this is often the *correct,* technical approach to a Hindu Law problem. The awkwardness and angularity of the Hindu Law has not infrequently been a source of delight to some Hindu judges who have administered it, but others are cynical, admitting that the anomalies are past logical reconciliation, and leaving the mess for the legislature to clear up. Perhaps this approach is more accurate in the long run, and more profitable, than that which seeks complacently to squeeze to-day's feet into yesterday's shoes.

35. A newcomer to the subject might well ask, "If intellectually speaking the law is so unsatisfying, what have the *shastris* been doing all this time, who you say are the descendants of the old classical jurists, exponents of the *dharmashastra,* which is supposed to be a splendid system of jurisprudence?" The fact is that very few *shastris* deeply learned in the system are now to be found, and they have no responsibility for the administration of the law. No profit whatever has been forthcoming from the study of this abstruse and difficult subject since the days when the last Hindu Law Officers officiated at the Presidency High Courts. Modern advocates and judges, even those knowing Sanskrit, have little experience of and less responsibility for the maintenance or progress of learning in the *dharmashastra,* and the study of that subject is so arduous that no expert would ordinarily be in a busy practice in the profession. Several exceptions have been known, but few of these—and they can be counted on the fingers of one hand—have been able in any respect to sway the general trend of the development of the Hindu Law in the courts. In so far as they have functioned as advocates they have been disqualified from performing the function of *amicus curiae* which was the

old role of the *shastri.* Voices in the wilderness, the modern *shastris* are often totally indifferent to the condition of the current Hindu Law, which has to be borne, like any other section of the law of India.

36. It is said that the system is at once too lax and too rigid. Indeed, as we have seen (sec. 10), Custom, once proved, will displace *pro tanto* the *shastric*-cum-judicial law which we call the "Hindu Law". No justification for such customs is ever required, and a patchwork situation is encouraged. Even the legislature on rare occasions has saved customary law[19] where there would not seem to be any justification to do so. On the other hand Jains, Sikhs, Lingayats, Arya Samajists, Brahmo Samajists, Buddhists and even professed atheists, despising all religion, have to suffer the application to them of the Hindu Law, unless they can prove a custom which exempts them in the relevant context. Those who deny every one of the cardinal doctrines which usually serve to identify Hindus are as much Hindus for this purpose as the most orthodox.

37. We have already dealt (secs. 11-13) with uncertainty, the gaps in the law and the doubt as to the capacity of the Hindu Law or that elusive entity, Justice, Equity and good Conscience to fill those gaps. Codification alone can attempt to answer this difficulty.

38. Frauds can be perpetrated quite legally under the shadow of the Hindu Law, and it is a tribute to the good conscience of the Hindus at large that these opportunities have not been utilised as fully as might have been the case. The powers of the guardian (see sec. 189 below) naturally come to the mind at once, but that is by no means the most striking avenue for fraud. Alienation by the manager of a joint family, by a widow in collusion with a presumptive reversioner, by a *shebait* or *mahant,* or even by an individual coparcener in South

India, all can be made means of making unjustified profits out of unwary third parties. Secret partitions and the skilful use of the right to reunite could do wonders. The Pious Obligation itself (see sec. 348 below) contains endless opportunities for chicanery. Registration of a sacramental marriage as a civil marriage under the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, can create side effects which are plain to the law but not obvious to the layman. Adoption can divest a whole chain of estates, without any fault on the part of the unfortunate purchasers. These are only illustrations of the titles of the law which provide a rich harvest for the ingenious but dishonest. Even the law of nullity of marriage can be turned to good account by a shameless confidence-trickster.

39. The last general cause of dissatisfaction is that the law is so difficult and expensive to know. This is not by any means a fault unique within the Commonwealth: it is a complaint constantly urged against every Common Law system.[20] But India is, of all the Commonwealth countries, the worst-off in this respect. Leaving aside the fact that all the English law reports are likely to be laid under contribution for the purpose of solving a new problem in Hindu Law, we must accept that the old reports and current reports of the High Courts and the Federal and Supreme Courts, not neglecting the series of Privy Council reports, form altogether a formidable bulk. Whereas the *muffasil* practitioner often contents himself with Digests, the High Court pleader is obliged to consult a mass of case-law which would depress any English Barrister who has usually only one set of courts' reports to consider. India has 26 High Courts or courts of approximately equivalent jurisdiction, and a Supreme Court, and from all these reports are pouring out month by month. Digests help immensely,

but their compilers are often afraid to omit a single case, and we are faced with the twin faults of reduplication and lack of perspicuity.

40. With all these complaints against it, is there nothing good that can be said in favour of the current Hindu Law? Indeed it suits generally and by-and-large the temperament of the Hindus, and they would now quickly reject its being replaced either by the Islamic law or the general law of India applicable to those not belonging to the Hindu or Muhammadan folds. Differences in the Hindu Law from State to State either reflect historical divergencies or are upon points of more or less indifference to the general observer, to whom they have only an academic significance. Thus it may be urged that Hindu Law and Hindus have some connection other than mere historical relationship, and that this has some meaning which all the complaints given above cannot shake. Sentiment and prejudice, habit and indifference to academic weaknesses produce such a point of view, which is nevertheless sincerely held by many. Yet it is no compliment to a system of law, particularly one of such practical importance, that one should be obliged to search for points in its favour.

6. *How can the defects be remedied?*

41. The part of the public which sees the faults and desires to remedy them can be divided for convenience into two main groups. Their classification in this manner is somewhat over-simplifying the position, but that method will probably serve our purpose best, since persons who partake of both characteristics in some degree are not ignored by the dichotomy. On the one hand, then, we have the "orthodox" and on the other the "reformers".

42. The "orthodox" ask for a return to the *dharma-*

shastra, a redefinition of *dharma* and a reinterpretation of the Vedic and *smriti* texts in order to devise a new Hindu Law which will bind both the conscience and the legal practice of Hindus. Extract the obsolete parts of the law; re-establish the remainder; draw out the thorns which had adhered to the *shastric* law during the British period and enact a series of rules which will enunciate not only orthodox Hinduism but a practical morality in accord with modern needs. The "orthodox" contend that the fundamental factors of human existence have not changed since the times of the last great commentators. India is still largely a mediaeval country, owning a mediaeval approach to law, and a mere collection of rules either distorted from the *shastra* or borrowed from other countries or carelessly or recklessly imagined by persons who have never studied the nature of justice or the function of Man in Life as a whole and who, as like as not, know nothing about Indian traditional culture, cannot hope to satisfy the spiritual longings of a spiritually-inclined people. Law, morality and religion cannot remain sundered for ever, and the breach between the law administered by the courts and the law that the villager really respects (but does not necessarily obey), the eternal law, must be healed or the present schizophrenia which gravely damages Hindu social life will in the end prove fatal to the distinctive Hindu civilization.[21]

43. The "reformers" cannot grasp the point of the foregoing. They cannot see how it could lead to a practical project. They fear that if it were accepted the private law would be handed over to fanatics. Competent *shastris* are so few, and fewer still can understand the language of legal draftsmen; the two techniques are poles apart and not mutually compatible. Cooperation of this kind must be in difficulties from the start; once launched it will

founder amid endless controversies on matters of first principles, not to speak of details. Let us commence, they say, from the known and move to the unknown, adventuring as little as possible beyond the realm of actual tried experience.

44. Amongst themselves the "reformers" can be divided against into two camps: those that ask for a comprehensive civil code and those who are content temporarily with a Hindu Code. The Constitution lays down in Article 44 that

> "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

This respectable authority, though, no doubt, a pious hope rather than a concrete expectation, is evidence of a powerful demand for a Civil Law for all India. This of course implies the abolition of the Islamic law, Parsi law and the general law, for example the parts of the Indian Succession Act which do not apply to Hindus or Muslims, the Special Marriage Act, the Indian Christian Marriage Act, and so on, and the Hindu Law would not be the only system to be destroyed. But comprehensive demands for reform are heard nowhere else except amongst Hindus,[22] and the faults in the other personal laws are by no means so glaring or so numerous or so practically important. Muslims might be induced to accept reforms adopted in predominantly Islamic Middle-East countries, but Parsis are adamant against reform of their law.[23]

45. Consequently the best that can be asked for is that, as an intermediate step, a half-way house, the laws of the Hindus should be reduced to one comprehensive pattern, so far as may be possible. No gaps should be left which skill can fill; the future as well as the present should be catered for wherever possible. All of which

envisages the eventual enactment of an Indian Civil Code which shall embrace all citizens of India.

46. A question arises, whether in framing this Hindu Code aid should not be taken from foreign sources. Need the "reformers" rest content with material experienced *in India*? China and Japan, Siam and Turkey have all adopted in larger or smaller measure the civil laws of western countries. Turkey in fact simply adopted the Swiss Civil Code lock, stock and barrel. Iran, indeed, blended Islamic rules with material garnered from western experience, the latter largely occupying the place of former Islamic or indigenous procedural provisions, but the experience of Egypt in an opposite fashion is not without its moral. Egypt enacted a Succession law which applies to all Egyptians, Christian, Jewish and Muslim alike, though its content is almost exclusively Islamic in origin. Are these precedents of any help to India?

47. We must note, in reply, the fact that India is indeed one of the Common Law countries, and her allegiance to that division of the world's legal systems is beyond any doubt, despite the widest application of two indigenous systems of personal laws. In many an innovation she tends to look to English or United States experience as a guide, and anything borrowed from a Civil Law jurisdiction might consort very ill with the remainder of the Indian law. But where is the need to seek aid on so intimate a topic as the private law of Indians from foreign countries, except in purely mechanical or procedural contexts? The Indian needs must be met with Indian expedients; though foreign forms may express they will not create solutions to current Indian problems. India has legislated before on Hindu Law and does not lack lawyers of sufficient acumen to utilise not

only local but also foreign precedents to meet local requirements.

48. A sure instinct begs that legislation should be confined to the bounds of every-day experience and should not include rules of a purely speculative or experimental character. The attitude which is often voiced to the effect that "we may pass the Bill now, even if it really needs further amendment, since we can attend to it again at leisure", seems unworthy of those who have to build for generations, and who are going to exact a confidence which they have not in reality earned. In any event no one can be sure that material borrowed from some other jurisdiction will have the same effect in India which it has there.

49. The "reformers" thus have to walk a tight-rope. They must maintain a delicate balance between being bold but not inconsiderate, conservative yet not too timid. Can caution and reform go hand in hand? The successful passing of the Hindu Marriage Act, 1955, suggests that they can.

CHAPTER II

CODIFICATION: THE CASE FOR AND THE CASE AGAINST IT

1. *What is meant by "codification"?*

50. It is very important to remember that by "codification" three very different notions can be conveyed. To take examples, the Indian Penal Code, the Indian Evidence Act, the Indian Contract Act, the Limitation Act, the Criminal Procedure Code and so on fall into one category; the English Real Property Act and Administration of Estates Act, the Offences against the Person Act or the Companies Act form a second category; and the French Civil Code, the Swiss Civil Code or the proposed Succession Bill for Israel can be placed in a third category. The differences are subtle, but no project of codification can be criticised unless we know into which category the Bill is to fall.

51. The first type of Code is intended to give an exhaustive account of the law occupying that chapter; every aspect of the subject is covered, and the minimum room for conjecture or for judicial "interpretation" is allowed. Case-law certainly builds up around it but adds little to the significance of the sections of the Code itself. These Codes are written in technical language not easily intelligible to the unaided layman.

52. The second type of Code, more typical of English "codification", aims rather at reform than collection and simplification of the existing rules, and operates not as a body of law exhaustively stating the chapter in question, self-sufficient or complete in one body, but as a set of

enacting or repealing rules which have to be read against the background of the pre-existing law. Someone who was ignorant of the former law would be incapable of understanding, let alone applying, the new law. The acts are to be looked at rather like notices plastered upon a notice-board to which adhere many previous notices, most of which have not been covered by the latest arrival and have not even been torn free, except at the edges. Such codification not infrequently gives rise to its own difficulties, sometimes creating problems which did not exist before, because of the imperfect knowledge of the previous law possessed by the draftsmen and legislators. In the Common Law systems this fault is particularly to be apprehended.

53. The third type of Code, which is characteristic of the Civil Law systems, as opposed to the Common Law systems, not only abrogates all previous case-law and statute-law on the points covered in it, but starts, as it were, from the beginning. It commences by setting out in the briefest form the principles which are to give life to the law, with illustrative or exceptional material where, and where only, this is absolutely requisite. Such Codes are written in simple language and contain their own definitions of difficult words. This is not to say that a layman can by reading the Codes alone conduct his own litigation without other assistance. The simplicity may at times be a trap, for in practice a technique or "doctrine" has grown up out of the blending of jurisprudence and even philosophy with practical detailed experience, which effectively guides the courts in their application of the sections or articles. The decisions of the courts, which collectively form what is called the "jurisprudence", are only a rough guide to the manner in which a particular dispute will be settled, since in theory it is the Code which

rules, and the courts cannot set up a parallel source of law which is in conflict with it. The doctrine of *stare decisis* does not exist in the Civil Law jurisdictions (except in Louisiana in the United States and Quebec in Canada) and even the rulings of superior courts will not invariably bind inferior courts. There is only one exception to this general position, namely in the administrative tribunals, where public policy may insist upon regard for precedent, which is paramount in Common Law jurisdictions, even in the interpretation of statutes. India, belonging as she does to the Common Law group, would find it impossible to work a Code of the third type upon the lines familiar in Civil Law jurisdictions, but that does not mean to say that a Code framed upon a Continental pattern might not be workable and valuable in its own way in India.

The former French and Portuguese possessions in India are familiar with the Civil Law and with codification of the third type and it will not be long before the Supreme Court has to administer the Civil Law in an appeal from Pondicherry. No doubt it will find it as easy as the Supreme Court of Canada or the Privy Council have found the task in similar connections. But precedent will have been introduced, and superimposed upon the pre-existing Continental foundation, in which precedent played a very subordinate part, and the result will be an amalgam the character of which it will be difficult to foresee. Hence there is little likelihood that India as a whole will borrow from Pondicherry or from Goa. In fact the Hindu Marriage Act, 1955, belongs unquestionably to the *second* (not the *first*) class of Codes.

54. The original intention of the "reformers" was to codify and reform, but principally to codify. All the

existing law was to be entirely replaced. In this they were, for once, in agreement with the "orthodox" in thinking that a fresh start was required, and that one must begin from the beginning. This position has gradually been abandoned, as we shall see. Undoubtedly reforms and restatements of the law ought to flow from first principles, but the story of the "Hindu Code Bill" is a story of baulked ambitions and frustrated theories in this connection—for the Hindu Marriage Act and the Hindu Succession Bill are alike in leaving it to the text-book-writers, if any such can be found, to rationalise and justify, to expound and portray, the living principles behind a mass of regulations, which do not appear to have any underlying thread within them at all. No doubt this is not the way in which a Code ought to be framed. One should know what in reality one wants to effect, and should not be afraid to say what it is. But in practice too clear an announcement of the end to be achieved is undiplomatic and might prejudice the success of a Bill in Parliament, and the English method of "codification" is perfectly adjusted to reforming the law without declaring openly what object is aimed at. Even the *Objects and Reasons* which are published simultaneously with the Bills themselves need not be too explicit, and may take much for granted. Dr. Ambedkar came to grief largely because he proclaimed a little too loudly (and perhaps mistakenly) that the "Hindu Code Bill" was going to break the pride and power of the high-caste Hindus.

55. But these discussions of the types of Codes, their respective merits and the appropriate techniques for enforcing them are pointless so long as we are not agreed that codification itself is needful. There follows an attempt to summarise the cases for and against the project.

2. *The case against the proposed method of codifying Hindu law.*

56. When the "reformers" suggest that Hindu law should be replaced by a comprehensive Code covering all except a very few chapters of that system, and at the same time indicate certain substantial reforms which they have in mind to suggest, objections are raised by the "orthodox" and by others which may be summarised as follows:—

A. The Hindu law is based on a divinely revealed law and ought not to be disturbed.

B. The amendments proposed include some that directly controvert Hindu religious doctrines.

C. In view of the foregoing arguments no person is authorised to put such amendments into effect, since no Hindu, let alone a non-Hindu, may legislate contrary to the tenor of the Veda. This last can be known only from the *dharmashastra* which can be interpreted only by those specially qualified in that science. Such persons are few, or not represented at all, in the present Parliament.

D. Even if authority could be conceded, as a matter of *apad* (or "general distress") and under protest, to a modern legislative body, it would be inexpedient in a secular state to legislate in such a way as to subvert religious tenets by making it either difficult to put religious tenets into practice or easy to evade putting them into practice.

E. Similarly, if any reform is to be made, there should be no discrimination against Hindus and others, while the personal laws of Muslims, Christians and Parsis are left untouched.

F. If it be admitted for the purposes of argument that amendments in the current Hindu law are indispensably necessary, then only such changes should be made

as will bring the current law more nearly into agreement with the *dharmashastra.*

G. Alternatively, if the foregoing proposition is not acceptable to the "reformers", the minimum reforms should be carried out by means of a statute similar to the Hindu Law of Inheritance (Amendment) Act of 1929 or the Hindu Women's Rights to Property Act of 1937, and they should abstain from promulgating an ambitious and pretentious Code, which might produce unforeseen and possibly harmful effects.

H. Further to the foregoing argument it must be pointed out that if the "reformers" insist upon a Code of a comprehensive nature they must make up their minds about the residual law to which the Courts must turn in a *casus omissus,* that is to say, where a problem turns out to be incapable of solution by reference to the terms of the statute. Either the present law, which is admittedly confused, or the *dharmashastra* or some other law must be stated to be the residual law (as was done in Mysore in Act X of 1933) ; otherwise undue confusion and absurd anomalies are bound to arise sooner or later. In any case it is argued that the pattern will be inharmonious and anomalous and this is a cogent reason against attempting a comprehensive Code.

I. It is said that a Code would be easier for the layman to understand than the current law, would be the cheaper for that and other reasons to enforce, lessening litigation on topics arising within Hindu law. But the result for some time after the commencement of the Code would be to increase litigation. People would rush to the Courts to "try their luck" under the new system. And the law would hardly be *more certain* until the Supreme Court had pronounced on every ambiguous point in the Code. No Code can claim to be free from latent ambigui-

ties. Moreover, if the Code is to be effective, and to be certain to have its intended effect, the draftsmen will be obliged to draft it in technical language and as a result the Code will be as unintelligible to the layman as the current law.

J. The effect of every Code is to ossify or to crystallise law. Whereas the current law is capable of adjustment in the hands of the judges, as soon as important branches become codified a rigidity will prevail which nothing but legislation can cure, and legislation is always tardy, troublesome and expensive and may give rise in its turn to the identical objections.

K. Lastly, numerous proposals in the "Hindu Code Bill" are unduly novel and revolutionary, introducing an element of risk which is entirely undesirable.

57. The arguments are not, of course, of equal value, or equally impressive to an impartial observer. They are all, however, sincerely held and the sincerity and consistency of the majority of the "orthodox" party naturally claims and receives the sympathy of a large section of the general public. Answers to these arguments form the second part of the case of the "reformers". But we must first enquire into their position from its positive and constructive side.

3. *The case in favour of codification.*

58. The positive arguments of the "reformers" include the following:

(*a*) Codification of Indian private law is laid down in the Constitution as an object of national policy (sec. 44 above). Codification of Hindu law is a necessary preliminary step to that end.

(*b*) Unification of law in India is an undoubted aim of a public which ardently desires unification as an object

of general policy. Even separatist movements are to be understood against the background of general secure unity, and it is unity alone which will satisfy national aspirations. In order to unify Hindu law—one small aspect of national diversity—there is no possible means except codification.

(*c*) The Hindu law is overdue for reform in certain respects which cry aloud for amendment in the face of undoubted political and social developments in the last half-century. In particular differential treatment in the private law on the ground of caste must be removed as with all caste-distinctions.

(*d*) On mere technical grounds the Hindu law must be amended and simplified in order that it may be more certain, more homogeneous, less anomalous and less self-contradictory.

(*e*) The present complexity, uncertainty and rigidity, which is unique in the civilized world, profits none but the legal profession ; it gives rise to unlimited injustice and fraud since the public often hesitate to enter upon litigation which may turn out to be not merely hazardous but intolerably dilatory and expensive. An advantage is thus given to the rich or unscrupulous litigant.

(*f*) The results of the present situation are so distressing that there can be no advantage in delay, and the work of codification should go forward without further hesitation.

59. It remains to meet the objections raised by the opponents of codification. This will require rather longer treatment than the positive arguments, the background to which has been fully considered in previous Chapters.

60. *As to argument* A:—It is said that Hindu law is based upon a divinely revealed law, which ought not to be disturbed. Some (but not all) *shastris* believe that no legislation was possible according to *shastric* doctrine, unless it were in accord with the tenor of the Veda, in

which case it would be merely declaratory and not innovative legislation. This view is to-day held by K. V. Rangaswami Aiyangar and was held by the late Ramachandra Dikshitar and others. There are two ways of looking at this problem and it is important to bear the distinction in mind.

From the purely esoteric, technical, *dharmashastra* angle, it is perfectly clear that, despite the fact that the Veda remains the source of all knowledge, the *shastra* itself has by now placed custom in a higher category than was formerly permitted. It cannot be denied that whereas originally no custom or *sadachara* was of any value as a source of law except in those instances where the *shastra* either presented the individual with a choice or gave no indication at all on the point, subsequently, as Ganganath Jha showed long ago,[1] *sadachara*, or the practice of good men, learned in the Veda, could actually take the place of *shastric* injunctions themselves. Whereas the chain of authority had originally been from Veda to *smriti*, or presumed Vedic text to *sadachara*, and then from *smriti* to the *shastra*, comparatively recent authors of high standing allowed a *smriti* to displace a Vedic text and even a *sadachara* might displace a *smriti*. The scholarly *shastri* will still find this hard to swallow, but it is an accomplished fact. This is what the British Courts followed, when they allowed Custom to displace the Hindu Law wherever proved and not contrary to public policy or unreasonable (see sec. 10 above). Even the "orthodox" cannot deny how this topsy-turvy situation came about, since some of their own number were responsible for it.

The ancient chain of authority can no longer be revived artificially, since only a small fraction of the learned public will to-day assent to the authority itself. General approval of Vedic learning is one thing, but agree-

ment to be bound by the law set out in Vedic texts is quite another matter, and is not to be expected anywhere.

From the practical standpoint, however, it is not entirely true that legislation was impossible. Customs had to be followed by the King when hearing cases—so the *shastric* texts themselves teach us, and there is ample evidence that the King not only followed customs but also sanctioned their creation. Legislation was either general or sectional, upon isolated topics or on a range of affairs. There are inscriptions extant from various parts of India, particularly the South (where inscriptions survive in good numbers), which record that the ruler sanctioned certain rules and regulations of private and public law in regard to a caste or castes, inhabitants of a village or a district. These records make interesting reading: sometimes they are found to be in accord with the *dharmashastra* (in which case we can infer that the *shastra* was flouted legally up to that time) and sometimes they are quite the reverse.[2]

From a further viewpoint it must be observed that the *shastra* itself regarded *some* provisions of the *shastric* texts as merely declaratory of practical customs and usages. This was particularly the case with the *vyavahara* portion of the law. And where the source was really custom, there could be no objection to interference with the rules.[3] It is quite another matter with *achara* and *prayaschitta,* where the *shastric* rules proceed immediately from unseen authorities, reason plays a very small or a negligible part, and consequently the certainty of the learned and their disagreements among themselves are equally remarkable. The law of marriage and divorce, of course, belongs, according to the "orthodox", to the *achara* and not to the *vyavahara* portion, and the argument given above does not apply strictly to that chapter of the law.

Then again, we know that by the beginning of the British period the Vedic law (whatever that may be) was hardly followed by any numerous community. The *shastric* law was in force subject to so many customary deviations that its origin was not easy to trace. But by now Central and State legislation has altered the picture entirely, and fundamental changes have long been suffered by all classes of Hindus, mostly without murmur or comment. Little of the spirit of the *dharmashastra* remains in force, and only its form is given an occasional tribute by the Courts. The changes have been piecemeal and often imperceptible to the masses, but this does not mean that the cumulative effect has not been radical.

61. *As to argument* B:—The proposed rules regarding divorce, adoption and succession, for example, may be admitted at once to be contrary to religious doctrine. But this admission is of no value unless we agree upon a particular definition of "religion". Such a definition will have to be so wide as to pass well beyond the bounds which an ordinary definition of "religion" would suggest. Perhaps the Courts have gone too far[4] in their definition but they are probably nearer what the average citizen means when he uses the word. The relationship which an individual believes he bears to his Creator or to the motive forces of the world, a relationship which inspires him with a supra-material regard for truth and good conduct, this is something which is much more intimate than a concept which, hiding under the name "religion", prescribes rules in minute detail concerning the order in which heirs ought to take the property of a deceased person, and the exact sorts of relations who ought not to be taken in adoption. Philosophy, reason, superstition or sheer love of regulations for their own sake, may justify such elaborations, but hardly religion in the usual sense of the word.

If we were to agree with the point of view of those who say that the laws of marriage and succession, maintenance and guardianship, are religious laws, we should be adhering to a sectarian and dogmatic standpoint. We should be taking part in a theological controversy, and this is a part which no Parliament in modern times will be content to play.

It is clear moreover that many of the so-called religious arguments which are found in the *shastra* in support of complicated provisions of law are there not as *sources* of the rules, but as props. It is far from being proved that the rules could not have stood by themselves. Their justification by means of these religious arguments, and their rationalisation was due to a desire to propagate and organise, and legal development, teaching, and explanation to the people might have been impossible without such aid. Jurisprudence owed much to those theories, but we are now beyond their assistance.[5]

Further, if the present law must be preserved as a sacred law, what of the laws that preceded it? Immense changes have taken place because of the passage of time and the intervention of the British legislature and the courts. At all the stages in development even before the British period, while the *shastra* was moving, growing and being transmuted, was there ever a time when the law was founded upon religion and so unchangeable? If that was always the case, why should our changes not follow the chain of prior changes? If that was never the case until now, whence comes the sanctity of the present hotchpotch, the character of which has been described above?

Moreover, many of the rules of *vyavahara,* and many others, were followed by Buddhists, Jains and others, who despised cardinal Brahmanical doctrines.[6] Even *nastikas,* scorned in the *shastra,* were governed by them. The

Arthashastra, which does not pretend to be motivated by religious scruples, contains many *vyavahara* rules closely corresponding to the *dharmashastra* equivalents.

62. *As to argument* C:—No other method of reform of the Hindu law is now possible except through the instrumentality of Parliament or the State legislatures. In the pre-British period the methods of declaring the law, or of making a choice between legal alternatives, or of legislating in the modern sense, were haphazard and seldom quite effective. The mere concurrence of *shastris* in an opinion, the manifestation in rational form of a caste custom, the choice of an individual as Chief Justice: all these might affect the course of Hindu law, but never in more than a select number of instances. These inadequate means are, fortunately, entirely obsolete and could not be resuscitated with any measure of public confidence. The public at large do not place any value in a *shastri's* pronouncement on *vyavahara,* which they know has long been divorced from practical effect, and they will resort to him only in connection with *achara* and *prayaschitta,* the more truly "religious" remains of the Hindu law.

The very first legislation upon Hindu law was carried through without the assent of a single Hindu, yet it has been effective to a large extent. The recurrence of *sati* in independent India is probably an obscurantist revival which cannot long survive even in a very backward part of the country.

Orthodox Hindus are quite satisfied with the Indian law of Contract, Tort, Equity and Criminal Law, and yet these were and are valid, in abrogation of the pre-existing law, either by the Indian legislature's enactment, or by the administration of justice by the modern Courts. Their objection attaches only to a reform of the personal law. Why is this distinction being made? If the pre-1955 law

should be preserved as regards Marriage or Succession, why should not the old *dharmashastra* rules as to debt, etc., be reintroduced? Yet no one seriously expects this to be done.

63. *As to argument* D:—This is a somewhat more substantial argument since it can be assumed rather easily that one of the purposes of law is to facilitate or encourage, or at least not actively to discourage, practices tending towards the acquisition of merit and the advancement of morality. That Matrimony should be a permanent bond, and that the next in order to give *pindas* for the benefit of the soul of the deceased and his ancestors should take the property by succession, may well be notions conducive to morality and abstract justice. They may in a way be called religious, since practical experience alone does not lead to any such conclusions. Yet two comments at once spring to the mind: if religious injunctions are rightly understood and sincerely believed, they do not cease to bind the believer even if legislation gives him a chance to evade his duties—*i.e.*, the religious Hindu will not seek a divorce although he might be legally entitled to one, and a man under a duty to offer a *pinda* will not cease to offer it because he has failed to take the inheritance[7]; again, legislative props to religion are seldom, if ever, of any real use—people cannot be made moral by statute, still less can they be made religious. And if the legislature ought to abstain from altering the law on this ground, why should it not reintroduce rules which were in force in pre-British periods and which were intended to further religious ends[8]? There would be no end to such a process.

Moreover Hindus have for years acquiesced in legal rules which have enabled them to avoid those very duties, and many others. The Hindu Widows' Remarriage Act, the recognition of testamentary disposition, of which

Hindus are not ashamed, and the Hindu Law of Inheritance (Amendment) Act have torn open the structure long ago. And Hindus have complained only that their provisions have been insufficiently liberal! Again, there are elements in the present legal situation which do not aid the performance of religious desires: the Shudra cannot become a *sannyasi* except by custom, and the Bengal High Court formerly introduced rules about Dayabhaga succession which no doubt postponed a prior *pinda*-giver to a subsequent colleague. The argument of the "orthodox" might serve rather as an argument for reform than otherwise.

64. *As to argument* E:—Non-discrimination against Hindus on the ground of religion may well be a constitutional safeguard. But when the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act and of the Mysore Hindu Law Women's Rights Act was investigated[9] the respective High Courts were agreed that the constitution allowed discrimination which was in the interests of the higher requirements of social welfare and reform. The position taken up with regard to reforms on the part of minority communities has already been mentioned (sec. 44 above) and the grounds for proceeding first to a Hindu Code and finally to a Civil Code.

65. *As to arguments* F & G:—Piecemeal reforms are much feared by the "reformers", perhaps with undue anxiety. But there can be no doubt that by merely tinkering with the position the result might be left far worse than the present chaos. The members of the Hindu Law Committees have been generally anxious to prevent piecemeal reforms. The case of the Hindu Gains of Learning Act, 1930, is in point: the statute created new difficulties, which are not squarely faced by the Courts yet, and left dangerous and unexplained anomalies. The Hindu Inheritance

(Removal of Disabilities) Act does not apply to those subject to Dayabhaga law. The Hindu Marriages Validity Act, 1949, did not apply to Buddhists. Other examples could be given, amongst which the Hindu Women's Rights to Property Act, 1937, is the most frequently condemned.

Whether reforms are to be tolerated only so far as will enable the *dharmashastra* to be more nearly approached, or whether only so far as to amend the current law in those respects in which it offends informed opinion or is technically unsatisfactory, in any event the result would be a patch-work, difficult to expound and use, a happier hunting-ground for the expert practitioner than even the existing jungle of authorities.

66. *As to argument* H:—This difficulty is a very substantial one, and the "reformers" have only this answer to it that it must be overcome if possible. Here however there is disagreement, since some say that it is impossible to overcome the difficulty satisfactorily, while others say that the Courts will themselves find a way out of it, and that the task should be left to them. This is a hasty notion, since until the matter reaches the Supreme Court the greatest confusion is likely to prevail among the subordinate Courts in each State, and those inferior to them will be in grave doubt what course to follow. Knowingly to thrust the Courts into a difficulty would seem to be a grave error, since the theory in the Common Law system is that the Legislature is invariably wiser than the judge.

Yet even this objection, if not attended to, will not prove fatal to the project of codification. The Courts will not be able to pass any decree contrary to the Code's provisions, and for gaps in its provisions there is no reason to suppose that it will go further than the pre-Code law for assistance. If, as many of the "orthodox" think, the

existing law is or was better than the proposals of the Code, there can be no objection on their part to this eventuality.

67. *As to argument* I:—Experience in Baroda has indeed shown that, at the outset, a flood of litigation may be expected, but this is only a transitional feature and need not deter the project. If the principles are set out in a short comprehensive Code the knowledge of the law will be immeasurably more accessible to the lay public than can be the case at present. The scope for conjecture will be narrowed by the interpretation placed upon doubtful sections by the Supreme Court, and a useful hand-book on Hindu law will be capable of being written in 200 instead of 1,000 pages as at present.

68. *As to argument* J:—Codification has been feared as a possibly ossifying or rigidifying agent by all the followers of the so-called historical school of jurisprudence, of which Savigny was the leader. There seems to be no basis in the notion, which in any event applied only where a Code was intended to be imposed upon a people which had a living indigenous system of law, a vital feature of their community-life. In most continental countries, where the vitality of the civil law cannot be doubted, codification has been tolerated sufficiently well, and reform of the civil codes is a process which quietly incubates, readily springing into action at infrequent intervals, and bringing the provisions of the relevant articles up-to-date, whenever they cease to find effective champions. Codification in practice has not meant complete solidification anywhere beyond hope of amendment. The position in Hindu law as has already been described (sec. 26 above) is so artificial and rigid already that it cannot seek the protection of the school of Savigny. It is only in the very vaguest sense in contact with common Hindu sentiment,

and is a wholly fortuitous and fictitious amalgam. If the Bills are carefully drafted, and adequate scope is left to the judges in matters which turn to such an extent upon public feeling that they cannot effectively be set down in full and exhaustive details in a Code, then there need be no fear of an undue crimping and confining of the law.

If the case-law interpreting the Code becomes too rigid, supplementary explanations or amendments of the Code may have to be passed. A well-drafted Code will endeavour to avoid such eventualities where possible, but the way out of these difficulties is clear and unobjectionable. Since inertia tends to protect unsatisfactory statutory provisions unless they create scandals, the duty of Parliament to pass only very maturely-considered sections is obvious and imperative.

69. The final objection to codification will be examined in the remainder of this book.

4. *Examples of codification already in force.*

70. Nothing is quite so persuasive, say the "reformers", as the evidence of a precedent. India has known codification of Hindu law, and closely neighbouring countries have similar experience to tell of.

Baroda codified Hindu law in the famous *Hindu Nibandha* of 1937. The Mitakshara and Mayukha law was entirely superseded. The small State of Kolhapur enacted a Code of Hindu Law which was a reproduction of the sections of Sir Dinshah Mulla's work on Hindu Law, edition of 1919. In Mysore the Hindu Law Women's Rights Act, Act X of 1933, displaced the Mitakshara law, in the cases of persons governed by that law, except as a residual law to be referred to in cases of doubt. In Travancore and Cochin and the State of Madras numerous statutes are in force which very largely codify the personal

laws of persons belonging to several castes and following the *Marumakkattayam* or matrilineal law or the severely patrilineal "Nambudri" law, or the mixed systems known as *Misrattayam* and so on. Elements of great importance are indeed excluded from those statutes, but they are precedents for codification of Hindu personal law. In Nepal there is a comprehensive civil and criminal code which was recently enacted.

In Ceylon the Hindu law, known as the *Tesavalamai* or Custom of the Country, has been applied to all Tamils belonging to Jaffna, and the basis of the law is a document which, though not a Code in the continental sense, is to all intents a codification of the most commonly used principles of the law as known in the first years of the 18th century. Compiled by the Dutch it was enforced by the British and, though seriously amended by Ordinance, it still remains the bed-rock of Tamil customary law in Jaffna.[10] It is to be remarked that adoption has almost entirely disappeared in Jaffna except under the general law of the Island, and that the Hindus and Christians alike are satisfied to use a law of divorce and succession which has elements quite out of keeping with the *dharmashastra*, retaining a few peculiarities which betray the historical origin of the system.

In the Portuguese possessions in India, Goa, Daman and Diu, the history of the personal law is peculiar, but well worthy of being summarised. The non-Christians (which for historical reasons excluded Muslims) were found to be governed by customary law which to all intents corresponded with pre-Mitakshara Hindu law. The law was codified along with the law of tenures and revenue, as then administered under the successors of the Kadamba dynasty in Goa, by one Meixia, whose *Foral* (A.D. 1526) served as a Code of Hindu law for many years. By the middle of the seventeenth century the Hindu

inhabitants of Goa had begun to complain of the law of escheat, which the old Hindu kings and their Muslim successors had rigorously enforced, and which excluded daughters from succession, denied the right of testamentary disposition and gave widows only a right to maintenance. Thus, in effect, the non-Christians were clamouring for the application to themselves of the law of Portugal, which, their advocates pointed out, was more in accord with the "Law of Nature". The petitions to the King of Portugal were not granted in practice until more than a century had elapsed, and a dispute of interminable length raged over the matter until in the latter half of the 19th century Hindu law was abolished in the Portuguese possessions, and the Portuguese Civil Code was applied to all inhabitants indiscriminately. To this day some old Hindu families of Goa regularly take steps to evade some of its provisions; for example it is not unknown for sisters to release by deed their rights to an equal share of the father's inheritance. But the history of the Hindu Law in Portuguese India proves firstly that Hindus were even in ancient times quite capable of living under a Code, and secondly that they were prepared to accept a completely foreign Code of law when that Code became obsolete.

71. Leaving to one side the necessary examination of the various projected provisions, which will occupy subsequent chapters, it may be concluded from previous experience that, accepting facts as they are, rather than as they ought to be, the Hindu law is quite capable of being codified and reformed; that codification is not *prima facie* undesirable, still less impossible; that reform of some kind is urgently necessary; that certain reforms may answer contemporary needs; and that provided the reforming and declaratory provisions are well-conceived and well-drawn and adequate thought is taken for the needs

of all classes of those who will be termed "Hindus" for this purpose (see sec. 109 below) there should be no harm, but only positive good, in going forward with the project as a whole. Whether adequate care has been taken hitherto over all the projected sections is another question, which must be raised (where practicable) in connection with each individual topic.

CHAPTER III

THE HISTORY OF THE "HINDU CODE BILL"

1. *The beginning of the story, the Act of 1937 and attempts to state the Hindu Law in the form of a Code.*

72. The name "Hindu Code Bill" is now obsolete, since the projected Code was broken up for ease of treatment and was introduced, Bill by Bill, into the Indian Parliament. But the old name, which originates from 1941, sticks, and it is as such that the public know of the project. As will appear from what follows, the "Bill" has not been a single project throughout its history, but has undergone radical alterations as expediency and foresight, practice and realism have modified what theory alone originally projected as the ideal scheme. As a result many of the objections which were voiced against the former versions of the "Bill" are no longer relevant.

73. The story began not less than a century ago. The project of codifying the Penal Law of India was drawing towards its successful conclusion when it was hoped, both in Calcutta and in London, that the personal laws of the Hindus and the Muslims might also be codified. The project was dropped as impracticable in 1855. In the 1920's Mahamahopadhyaya Dr. Ganganath Jha, then a member of the Viceroy's Legislative Council, urged codification of the Hindu Law. The matter was eventually shelved as too difficult a task. By that time the need for unification and reform had already long been felt and the Mahamahopadhyaya himself (who knew more of the classical Hindu law than most people) was keen to see improvements and amendments made. His own greatest contribution to the discussion was the very

useful two-volume work called "Hindu Law in its Sources", written that critics and defenders of the Hindu law alike might know what the *dharmashastra* said on the subjects in dispute. It remains a kind of 20th century *nibandha ;* unfortunately it does not deal with marriage, except for the none the less invaluable chapter on adultery, which is one of the *sahasas* treated under *vyavahara.*

74. Several writers felt impelled to state the law in the form of articles using as few short maxims as possible. In each case the book produced was of vast bulk. The late Sir Hari Singh Gour was the first of these with his "Hindu Code" and the latest was Sri S. V. Gupte's "Hindu Law in British India". Sir Dinshah Mulla set out the rules in a less concise form in his "Principles of Hindu Law", but produced a work of convenient size. The classic work of J. D. Mayne on Hindu Law and Usage has been somewhat deformed by the activities of subsequent editors, and has become a rambling affair. Yet none of the worth-while text-books on Hindu law published in recent years has been of less than 700 pages.

75. It was the passing of the Hindu Women's Rights to Property Act, otherwise known as the Deshmukh Act (after the Bombay physician who sponsored it), in 1937, which precipitated the present train of events. It was discovered that when the Act had given the widow a son's share in the separate property of an intestate Hindu and her husband's interest in joint family property at Mitakshara and customary law, a completely new situation had been created with unknown possibilities. A misunderstanding had led some to believe that there was *shastric* authority for the rule enacted, but this was unfounded. Competition had formerly existed between spouse and issue only when the paternal or ancestral property was to be divided and the maintenance of the female was likely

to be endangered. The Act made her into something very like a coparcener (sec. 354 below) or male owner of ancestral property. This not only endangered her sons' position to some extent but indirectly threatened the expectations of daughters. The share also given to daughters-in-law whose husbands had died before their fathers-in-law was prejudicial to the daughter's position. The Act gave rise to several real difficulties of interpretation, some of which may not be capable of satisfactory solution (see sec. 354 below).

76. In 1929 a Bill had been passed which inserted the son's daughter, the daughter's daughter, sister and sister's son, after the father's father in the order of heirs (in Mitakshara law only), but omitted to insert great-grandchildren of the deceased. A Sri Santanam introduced a Bill placing the son's daughter's son and the remaining great-grandchildren between the daughter's daughter and the sister and added the sister's son's son. But this Bill, together with other piecemeal attempts to amend the Hindu law, was withdrawn when, by 1938, so many Bills were pending that the only course was to order an investigation of the situation as a whole, and the Act of 1937 together with the Bills then pending was placed before a specially formed Committee for its detailed consideration. This Committe under the chairmanship of Sir B. N. Rau, formerly a Judge of the Calcutta High Court, was set up in 1941 and rapidly reported, after examination of replies to a widely distributed questionnaire, that piecemeal legislation ought not to be attempted, but that a complete Code should be prepared.

2. *The Rau Committee and its Report.*

77. The Report of 1941 merely urged the Government to go ahead with comprehensive legislation. Its

aims were simple and the methods suggested easy: they are best expressed in the language of the Report itself: "We cannot", they say, "believe that even conservative opinion will be entirely unresponsive. Nor on the other hand can we believe that the thoughtful reformer will rush to lay violent hands on the ancient structure of the Hindu law except for proved necessity. It is a spacious structure with many schools and by a judicious selection and combination of the best elements in each, he should be able to evolve a system which, while retaining the distinctive character of Hindu law, will satisfy the needs of any progressive society. It is a Code of this kind that we contemplate: a Code which shall base its law of succession on the ideas of Jaimini rather than those of Baudhayana and its law of Marriage on the best parts of the Code of Manu rather than those which fall short of the best: a Code which generally speaking shall be a blend of the finest elements in the various schools of Hindu law; a Code, finally, which shall be simple in its language, capable of being translated into the vernacular and made accessible to all. Such a Code will doubtless take time and many minds will have to collaborate in its preparation." It need hardly be said that this prospectus, with somewhat visionary direction, could hardly have been expected to come to fruition as planned; the successive drafts of the "Hindu Code Bill" have been alike in failing to reach any such standard. But that alone is nothing to the point, since the process of selection from among the "schools" could never have achieved the desired effect.[1]

78. It will be shown later (sec. 116) how the *dharmashastra's* twofold existence leads to confusion of thought. But at this stage we must not pass in silence over the unpractical and illusory invocation of Jaimini and the "best parts of Manu". A correct understanding of the

texts of the *Mimansa sutras* to which reference was made by the Committee does not lead us directly towards any projected reform, either that of 1941 or those of 1955; the complacent branding of parts of Manu as "best" and parts as "falling short of the best" is another example of the notion that we have only to sift the *shastric* texts to discover something which will serve our turn, and out-face the *shastris*. This must frankly be dismissed as an amateurish approach, since every part of Manu and every part of all the *shastras* is effective and valid only in its traditional context, and the meaning can by no means be made out by the first Sanskrit-knowing person to read them. Moreover the appeal to the *shastris* by means of reinterpretations of the Vedas or *smritis* is absolutely futile, and Sri B. N. Chobe may have discovered this when he attempted just such a task in 1947.[2]

79. The 1941 Report was accompanied by two draft Bills, each of which was laid before a select committee of both houses of the legislature. Much publicity was given to the project, and as a result of these committees' reports the Hindu Law Committee itself was revived in 1944 and under its chairman, Sir B. N. Rau, prepared a Draft Code dealing with Succession, Maintenance, Marriage and Divorce, Minority and Guardianship and Adoption. It was this Code which was widely circulated and discussed and gave the name "Hindu Code Bill" to the whole project. After publication in twelve regional languages and the utmost publicity, the Rau Committee toured the country and examined witnesses, a summary of whose evidence is given in the Report of the Committee published in 1947.

80. The Report of 1947 included a revised draft of the Code, compiled in the light of oral evidence and replies to questionnaires. The revised Code was published

in the Gazette of India on the 19th April, 1947 after introduction in the Legislative Assembly as Bill No. 42 of 1947. The Central Government asked the opinion of the Provincial Governments on the Bill and while many Governments would not commit themselves to an answer, those of Bombay, Orissa, Madras and Delhi were among those which replied in general agreement with the proposals.

81. It was the intention of the Government that the Bill, which we shall call the First Draft, should become law on the 1st January, 1948, but the whole project was temporarily suspended when Independence led to the formation of the Constituent Assembly and the entire energies of the legislature were taken up with the vast problems of consolidating the new regime. The Ministry of Law revised the First Draft in 1948 and made some small alterations to it, making it more suitable for discussion in the Constituent Assembly, where it was finally introduced. This may be called the Second Draft. It was referred to a select committee under the chairmanship of the Hon. Dr. B. R. Ambedkar, a committee which was strikingly different in membership from the small and excellently-chosen committee which worked under Sir B. N. Rau. The Ambedkar Committee made a number of important changes in the Bill which must be considered separately. The Rau Committee's Report of 1947 and the work in the Law Ministry referred to above may be considered as a whole, for the First and Second Drafts had a great deal in common.

82. This version of the Hindu Code Bill aimed at the abolition of all customs contrary to its provisions, except those specifically saved, which were to be few and insignificant, if we except the characteristic Malabar personal laws which were, in general, left alone. Because

the legislature had at that time no power to legislate with regard to the devolution of agricultural land, that class of property was exempted from the operation of the Bill. Heirs on intestacy were grouped into several classes, with a special provision enabling various widows of agnates to take, in Bombay Province only, placing them between the classes of agnates themselves. Widow and son were to take in equal shares; predeceased sons were to be represented by their respective widows and sons: and daughters (whatever their condition) were to take half a son's share each. After these heirs the daughter's son, mother, father, brother and brother's son took in that order; then all the remaining grandchildren and great-grandchildren, each excluding the rest following in order on the principle that the nearer male link would give priority; other descendants of the father followed, up to the sister's daughter; then the father's ascendants and father's father's descendants up to the father's sister's daughter; then the father's father's relations up to the father's father's sister's daughter; then the mother's mother and mother's father and his relations up to the mother's sister's daughter. Then follow remaining agnates without limit of degree and after them the cognates, rules of priority being given. These will be discussed later, since they have remained virtually unchanged until the Sixth Draft. After cognates the old heirs, teacher, disciple and fellow-student were to take. Hermits were specially provided for. Women's property was to be all-embracing and the so-called women's limited estate was to be abolished: "a woman's rights over *stridhana* shall not be deemed to be restricted in any respect whatsoever by reason only of her sex." The order of descent of her property was to be to children, grandchildren, husband,

mother, father, husband's heirs, mother's heirs and father's heirs in that order.

83. Succession was thus to be greatly simplified. In regard to succession to females a revolutionary change was to be made—as regards succession to males a great deal of the existing agnatic pattern was to be retained, though in a new form. A complete innovation was the rule, which still forms part of the "Bill" that a wife's unchastity would only bar her right to succeed if it had been finally established in legal proceedings between her husband and herself. The Mitakshara "right by birth", the technical fountain-head of Mitakshara joint-family law was to be abolished—the most revolutionary step of all.

84. Apart from these, the Code's provisions were generally codifications of existing rules. The maintenance division did not contain any very remarkable innovation. Marriage however was treated, along with divorce, in a novel manner. "Prohibited relationship" and sapindaship were retained for the "sacramental marriage" (sec. 118 below) but the limit of sapindaship was reduced to three degrees through the mother and five degrees through the father. The requisites for a sacramental marriage contained no other novelty. The *saptapadi* (sec. 122 below) was given special mention but other customary forms of marriage were ignored. Registration of sacramental marriages was to be provided for, but not compulsory.

85. Alongside the sacramental marriage provision was to be made for a civil marriage for Hindus. The boy had to be over 21 except when his guardian consented to a marriage below that age. The conditions as to capacity to marry were less strict than the conditions for the sacramental marriage in that the requirement of non-sapindaship was not there. As under the Special Marriage Act provisions were given for giving notice, entering and

hearing objections to a proposed marriage, and so on. The contract of marriage was to be entered into in the presence of the Registrar by each party saying "I (A) take thee (B) to be my lawful wife (or husband)."

86. A strange provision followed, which is now part of the law of India. Its present motive is to swell the ranks of those whose law of succession should be the general law of India, instead of the personal law. Any person whose marriage had been performed in a "Hindu" form before the Act might have the marriage registered as a civil marriage subject to the appropriate conditions, in order that the consequences of marrying in the civil form might be attained. In the First and Second Drafts succession was not to be affected by this *ex post facto* conversion of the form of marriage.

87. Provisions for guardianship in marriage were generally similar to the current law before 1955, except that the order of exercising the rights and duties was laid down precisely, maternal relations being postponed to paternal relations.

88. Bigamy was to be a crime, and the second marriage void. Money paid or property transferred in consideration of a person's consenting to the marriage was to be held by the transferee as property in trust for the bride, to be transferred to her at the age of 18 or to her heirs if she died before attaining that age: this was an attempt to abolish the dowry system, or at least to modify its worst evils.

89. Nullity and divorce was provided for on grounds which seem ordinary enough to non-Indian readers. Civil marriages might be dissolved only under the Bill's provisions, but sacramental marriages might continue to be dissolved according to caste custom, as heretofore. Other-

wise the grounds for divorce were as follows: if the respondent

(*a*) deserted the petitioner without just cause for not less than five years before the petition : or
(*b*) ceased to be a Hindu by conversion to another religion ; or
(*c*) had any other woman as a concubine, or was the concubine of another man or led the life of a prostitute : or
(*d*) was incurably of unsound mind and had been under treatment for five years ; or
(*e*) was suffering from a virulent and incurable form of leprosy ; or
(*f*) had been suffering from communicable venereal disease for not less than five years before the petition ; or
(*g*) had been guilty of cruelty making it unsafe for the petitioner to live with him.

The grounds for nullity were:—

(*i*) that a former spouse was living at the time of the marriage :
(*ii*) that the parties were within the prohibited decrees ; and

provided that the petition was presented before the expiry of three years after the marriage or two years after the commencement of the Code if the marriage was celebrated before,

(*iii*) impotence from the time of the suit until the time of the petition ;
(*iv*) (in the case of a sacramental marriage) the parties were sapindas and the marriage had not been registered as a civil marriage ; and

(*v*) idiocy or lunacy at the time of marriage ; and *provided that the petition was presented within a year of the time when the force ceased or the fraud was discovered and the petitioner had not cohabited freely with the respondent after that time,*

(*vi*) consent of the party or of the guardian in marriage was obtained by force or fraud.

Nullity was to be available not only to persons married after the commencement of the Code but to those also who married before it.

90. As regards minority there were a few minor novelties and two major ones. The father of the illegitimate child might be its natural guardian after the mother. Even the natural guardian could not mortgage the minor's immovable property without the Court's prior consent ; and the *de facto* manager of the minor's estate (a most useful person) was forbidden to enter into any transaction on the minor's behalf.

91. Adoption was to see major changes. The customary *kritrima* and *godha* forms were to be preserved, but all other forms apart from that expounded in the Code were to be abolished. Males might adopt only after 18, and, if married, only with their wives' consent. All Hindu widows might adopt if over 18, if not prohibited by their husbands and if their power had not terminated either by her remarriage or if any Hindu son, son's son or son's son's son of her husband had died leaving a Hindu son, widow or son's widow. A father could not give a son in adoption without his wife's consent, if she were capable of consenting. Powers, both to adopt and to give in adoption, and prohibitions against either were to be by wills or registered documents. The adopted boy must not have been married, nor have had his thread-ceremony[3] performed unless he were a member of the same *gotra*. He

must be under 18 and must never have been adopted previously. No other restrictions upon the person who might be adopted. The *datta-homam* was not to be required. As for the controversial subject of divesting of property consequent upon the adoption, if the adoption was made within three years of the father's death, the adopted son should be entitled to the same rights as if he had been a posthumous son of the father, except that he should *not* be entitled to mesne profits, *i.e.*, to take the produce of the property which had accrued in the meanwhile out of the hands of the intermediate heir. Apart from this right and the right to divest the father's estate in the hands of the adoptive mother, no divesting was to be allowed. Adoptive parents might validly agree not to dispose of their property to the prejudice of the adopted boy, provided this was done by a registered document.

92. The Second Draft was a revision, and, as the Ambedkar Committee admit, an improvement on the general arrangement. It added, however, two grounds for divorce, *viz*, not resuming intercourse for two years after a decree for judicial separation had been pronounced and failing to comply for two years or upwards with a decree for restitution of conjugal rights. The topics of judicial separation and restitution were included in the Bill, the former appearing to be a greater novelty than was actually the case. For a discussion of these matters reference must be made to the relevant sections below. Customary divorces were prohibited in the Second Draft, although the rights to a divorce conferred by the Madras Marumakkattayam Act of 1933 were saved. This was the only Malabar statute over which the Constituent Assembly then had any jurisdiction. Reference to the *kritrima* adoption was deleted. The age for adoption was cut down from 18, which the Rau Committee had approved, to 15.

Physical giving and taking of the adopted boy was insisted upon. As regards divesting, the adopted son was permitted to divest only one-half of the property inherited by the adoptive mother from a deceased natural son of the father: no other divesting was to be allowed. Agreements curtailing the rights of adoptive parents to deal with their own property need not be by registered instrument. All agreements curtailing the adoptive son's rights were to be void. The rule known as the "pious obligation" (sec. 348 below) was—unnecessarily as it seems—specially abrogated.

93. As for intestate succession, the Second Draft suggested that when no son or unmarried daughter was entitled to succeed, the widow should take the whole estate within Rs. 5,000. The order of devolution was simplified and the limits of inheritance were cut down. The special rules for Bombay were omitted. Indeed some liberties were taken with the Rau Committee's Draft, but all, it would seem, were in the nature of improvements. After the preferential heirs the following were to come in order, each male heir taking double the share of a female heir where they competed:—

1. Father and Mother.
2. (1) Son's daughter, (2) daughter's son, (3) daughter's daughter.
3. (1) Son's daughter's son, (2) son's son's daughter, (3) son's daughter's daughter, (4) daughter's son's son, (5) daughter's son's daughter, (6) daughter's daughter's son, (7) daughter's daughter's daughter.
4. Brother and Sister.
5. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.
6. Father's father, father's mother.
7. Father's widow, brother's widow.
8. Father's brother, father's sister.

9. Mother's father, mother's mother.
10. Mother's brother, mother's sister.

After these came agnates within 5 degrees (calculated excluding the claimant and continuing both up and down the family tree), then cognates within 5 degrees. Succession to females was altered to the extent of allowing the husband to share with children, and, in default of children, *their* children by representation. The significance of these alterations will appear more clearly when each aspect of the Code is individually discussed below.

3. *The Ambedkar Committee and its Report.*

94. The Constituent Assembly referred this Second Draft to a Committee under the chairmanship of the then Law Minister, Dr. B. R. Ambedkar, which included none of the members of the old Hindu Law Committee. This Committee, though its Report was signed subject to an astonishingly large number of minutes of dissent, in fact endorsed the work of the Law Minister with hardly any amendment. It minimised the importance of the changes that had been made in the Law Ministry, and emphasised that the Second Draft was derived from the First Draft. Though the changes brought in by the Law Minister were almost entirely accepted by his Committee they did not let the Second Draft as a whole pass without substantial amendments of their own. Their Report was signed on the 12th August, 1948, and when it became public together with the Third Draft which was annexed to it public indignation, which had been aroused by certain of the proposals in the First Draft, broke out with renewed vigour. Various opinions were incensed to find the Third Draft in some respects less traditional than the First Draft, and in other respects less liberal and more doctrinaire.

The undoubted improvements which were introduced by that Committee did not attract equal attention.

95. After accepting and justifying the great bulk of the Second Draft the Ambedkar Committee made the following principal alterations:—

Third parties might petition for the dissolution of a marriage. Widows might appoint testamentary guardians for their minor children in default of the father's appointment. Not only was the birth-right abolished but all Mitakshara coparcenaries were turned into tenancies-in-common (see sec. 345 below). The Rs. 5,000 provision for the widow was withdrawn. The daughter's share was made equal to the son's. Persons subject to Marumakkattayam, Aliyasantana or "Nambudri" law were *not* to be exempted from the general law of succession. A provision was added by which children must be maintained by their mothers whether legitimate or illegitimate if the husband was unable to do so and the mother had sufficient means.

4. *The events of the autumn of 1951.*

96. The "Hindu Code Bill" in its Third Draft aroused widespread antagonism. The abolition of the Mitakshara joint family, equal shares for daughters, the abolition of the widow's limited estate, and the harsh heavy-handed treatment meted out to customs summoned from all quarters opposition to the Code as a whole. Every argument that could be mustered against the project was garnered, including many that cancelled each other out. Two parts of India at that time allowed divorces to all Hindus, even those married at Hindu law, otherwise than by a customary form of divorce. To extend this right to other parts of India did not seem *prima facie* so very revolutionary; yet the offer of divorce to all

oppressed spouses became the chief target of attack, and the cry that religion was in danger was raised by many whose real objection to the Bill was that daughters were to have equal shares with sons, a proposition that aroused (curiously) fiercer jealousy among certain commercial than among agricultural classes. Radical adjustments would have to be made by some of these if their social system were not to suffer, and this they preferred to escape if possible. The outcry, which was deliberately organised by interested opponents, became so fierce, particularly in the neighbourhood of New Delhi, that the Assembly and the Government wavered momentarily and, for the instant, wondered whether after all the project was capable of being carried through. The fact that the Constituent Assembly was not properly elected and fully representative of the whole people of India was pointed to with some vehemence: it would be better to postpone the matter for the attention of the first constitutionally elected Parliament.

97. A number of pamphlets were written condemning the Code. Attention was drawn to the qualifications and social origin of the Third Draft's virtual author. He, being the accredited leader of the out-caste communities (called Scheduled Castes), felt that he could speak for a vast proportion of the population of India, and that, as it were by a card-vote, he could fling a heavy weight against the flimsier opponents of the Code. Unfortunately he did not avoid—in fact he rather courted—the issue's becoming a caste issue, and the result of the controversy was almost certain from that moment. He saw himself as a second Manu, but with the additional title, "breaker of the pride of the twice-born classes". This role could not avoid drawing upon him the mockery of the few competent to criticise the Code in detail against the back-

ground of the classical Hindu law, and the obstinacy of his defence could not overcome the obstinacy of the attack.

98. When the Third Draft came to be considered by the Constituent Assembly the atmosphere was charged with unhappy and, indeed, entirely inappropriate sentiments. A very large number of amendments were tabled, but the Law Minister battled on, and by September, 1951 the session ended with only four clauses passed. That the fourth clause came to be passed was itself no small achievement, for that clause gave the Bill its over-riding effect. The principle of codification was thus admitted, without prejudice to the right to haggle over the individual clauses of the Code. The session ended, the Bill was virtually talked out, and it lapsed. The Law Minister himself resigned in disgust at the tergiversation of many of his supposed allies, and many thought that the Hindu Code Bill's chances of success were gone for ever. No one could tell whether the opposition had brought down the Government's enthusiasm or whether, after all, the Government was doubtful about the wisdom of the whole venture. A few saw that the opposition was entirely factious, and that, under more propitious circumstances, the project would get a more favourable hearing.

99. From that gruelling experience one very useful lesson was learnt, namely that compromise might achieve what rigid adherence to principle and common-sense might fail to attain. Practical utility and theoretical perfection had to come to terms, and the battle revealed that the practical approach might be in everyone's interests. The necessity for compromise had made itself felt at the last stages of the Bill's unhappy fight for survival. The Law Minister himself accepted that, in order that the Bill should be passed, even major amendments might be acceptable to the Government. A fresh Draft was hastily

prepared, printed, circulated. The Fourth Draft gave in to many, but by no means all, of the opposition's demands. It was known that if need arose even further amendments might be accepted in order to meet informed and unbiassed opposition half-way, or more than half-way. Yet the appearance of the Fourth Draft strangely encouraged the opposition and disspirited the "reformers". The latter had been wedded to the maxim, "the whole Bill and nothing but the Bill", and their faith in their leaders was undermined; the same reflection spurred on the opposition to greater efforts, and the project, as we have seen, collapsed.

100. Granted that the Fourth Draft was in the circumstances a hasty compilation, it is an interesting record, which has by no means been neglected in subsequent developments. In the first place the Malabar law of marriage and divorce was catered for in the body of the Code: similarly with Malabar joint families and Malabar succession to males and females. A draft of laws suitable to communities governed by Marumakkattayam, Aliyasantana and Nambudri laws was given for this purpose. More important, a series of clauses was added to reintroduce the Mitakshara joint family with certain modifications, such as would provide against a repetition of the technical difficulties now experienced in administering Mitakshara law. The proposed new version of the Hindu Women's Rights to Property Act was appropriately accounted for. Relations prohibited for marriage either by reason of sapindaship or otherwise were fully listed. An important amendment was to allow the daughter's share to be compulsorily bought by her brothers. Registration of adoptions might be made compulsory by State legislatures. It was proposed that no divorce might be granted within three years of the

marriage itself, a further borrowing from English law. Other amendments which might have been helpful, such as permitting customary divorces and removing civil marriage entirely from the scope of the Hindu Code Bill were probably contemplated but not published at this stage.

5. *Renewed courage: the passing of the Hindu Marriage Act.*

101. After the assembly of the first Parliament of the Union of India the question soon arose whether the Fourth Draft ought not to be introduced. Experience had shown that the entire Code was too bulky to admit of satisfactory treatment at one time. The Law Ministry wisely resolved to introduce the Code in the form of separate Bills, one to each chapter or Part, and each with identical "application" and "over-riding effect" clauses. In order to test the temper of Parliament the first part to be dealt with was not that part which was logically first, Marriage and Divorce, but only that part of it which proposed to deal with civil marriages. The most tactful method, and the most appropriate, was to take up the question in the form of a repeal and re-enactment with amendments of the Special Marriage Act, 1872. The Act was redrawn so as to extend its provisions to all citizens of India, without consideration of religion. This was novel since formerly certain results would attach to the declaration or non-declaration of membership of a religious community. The question of marriages between Indian overseas residents similarly required to be considered, and appropriate provisions were formulated.

102. The Special Marriage Bill of 1952 was sent to a Joint Committee of both Houses in December 1953,

under the chairmanship of the Hon. Mr. C. C. Biswas, Law Minister, which reported in 1954. The two Houses rapidly passed the Bill and the President's Assent was given in October of that year. The Act leaves the "Hindu Code Bill" free to concern itself only with "sacramental" marriages, but nevertheless impinges upon the Hindu law in several respects. Those Hindu males who marry under the Act are automatically severed from their joint family,[4] and both the spouses and their issue for ever will be governed by the Indian Succession Act in respect of the devolution of their property. The boy must be 21 and the girl 18 at least. Divorce by mutual consent is provided for, and this has a curious relevance for Hindus, since if these marry in the "sacramental" form and choose to have their marriage registered as a civil marriage (both parties must be over 21), all the results which flow from a marriage under this Act are available to them just as if they had originally been married under the Act. This is envisaged as producing a situation whereby the general law will be more widely applied : couples may go through a religious ceremony to-day and go to the registrar's office to-morrow—thus tradition and contemporary public policy will be satisfied at once. In Ceylon nowadays marriages are often registered first and then the religious ceremony is performed afterwards, but the effects are of course not identical with those envisaged in the Special Marriage Act, 1954. Hindus desiring a divorce by mutual consent, though there be no caste custom to give them their divorce (within the scope of the Hindu Marriage Act, 1955), may register their marriage as a civil marriage, and, after waiting the requisite period, can have their marriage dissolved without any grounds being required of them.

103. Meanwhile, the Hindu Marriage and Divorce Bill, in a form which we shall call the Fifth Draft, was

introduced into the Council of States. There it was duly passed with some amendments in December, 1954 in a form which differs somewhat markedly from the Fifth Draft, and which may be called the Sixth Draft (Marriage). This Draft was passed by the House of the People without amendment, and will be found in Appendix III below, as the Hindu Marriage Act, 1955.

104. Patience, planning and compromise have borne their fruit, and the success of the Marriage Bill augurs well for the future of other Parts of the "Hindu Code Bill". No doubt there also certain compromises will be needed if entire success is to be expected. The Hindu Minority and Guardianship Bill (No. VIII of 1953) was introduced in the Council of States in April, 1953. It is substantially similar to the corresponding part of the Fourth Draft, but may be known as the Fifth Draft (Minority). The Hindu Succession Bill (No. XIII of 1954) was introduced in the same House in December, 1954. Prior to its introduction the Bill was published in the *Gazette* in May, 1954 in a form differing somewhat from the corresponding part of the Fourth Draft, and may be called the Fifth Draft (Succession). The version actually introduced in the Council of States varied in certain important respects from the Fifth Draft (Succession) and may be called the Sixth Draft (Succession). Passed there with certain minor amendments it went to the House of the People, where, after a week's debate, it was passed with further amendments on May 8th, 1956.

Adoption and the Joint Family, as well as Maintenance, have to follow. Their future seems bright. It might be suggested that Joint Family, Maintenance and Succession ought to be dealt with together, since the topics are so closely cognate. Various objections on theoretical grounds can be raised to all the Parts that remain on the

legislative anvil, but this is a subject for subsequent chapters.

6. The special problems of application: who are Hindus for this purpose?

105. Throughout the foregoing discussions we have been avoiding a fundamental consideration which can no longer be postponed. Unless there can be no possibility of doubt, every codification must commence with a statement defining those who are liable to have the new law applied to them. The application of Hindu law has always been a matter of controversy and the problem as it stands at present divides itself into two compartments. Who are to be called Hindus for the purpose of having "Hindu law" rather than, say, the Indian Succession Act applied to them; and who are entitled to be exempted from the application of certain rules of Hindu law, though Hindus for that purpose?

106. The *dharmashastra* deals with the four castes, Brahman, Kshatriya, Vaishya and Shudra. It also mentions *antyajas* and *mlecchas*. The older books assume that those out-castes who do not fall within the king's jurisdiction are bound by their own customs, which are not expected to have anything to do with the *shastric* law. As time went on and *mlecchas* and other non-Hindus came within the pale of judicial administration, it was more or less agreed that although their customs did not derive from the Veda, and could not pretend to have any *shastric* sanction, nevertheless the king was obliged to respect them and enforce them in mutual disputes. Another view[5] was that in some respects the *dharmashastra* applied even to those people, in matters of *vyavahara,* succession and so on, since no other doctrine of jurisprudence could

be administered by a Hindu court in those regards. In effect it was something like the English doctrine of justice, equity and good conscience (sec. 24 above) acting in reverse.

107. British judges were perplexed by the difficulties which faced them. Many took the view that the Hindu law of the text-books was never intended to and never in fact did bind primitive tribes and Dravidian castes—that in fact it was always a prerogative of Brahmans. This view is now regarded as academically unsound. The High Courts however worked out certain very subtle distinctions which at present cover this subject. On the one hand there are supposed to be Hindus whose customs deviate from the Anglo-Hindu law, sometimes very widely, and on the other hand there are the Hinduized tribesfolk who have adopted some Brahmanical rituals and worship Hindu deities and follow many characteristic Hindu customs such as the thread-ceremony and pre-puberty marriages: both of these are allowed to be Hindus for our purpose. Tribesfolk, however, who have adopted only a few Hindu customs can be considered insufficiently Hinduized for this purpose, and the standard of Hinduization is at large.[6] The bed-rock notion was that laid down in the famous case of the Collector of Madura, where the judge is ordered to apply the law of the approved commentaries that are accepted in the region in question so far as it is consonant with the practice of that region. It is thus often a matter of doubt whether a particular people, such as Gonds and Santals, are or are not Hindus, and numerous decisions have given cause for discontent. The prevalent tendency of politically-minded middle-class town-dwelling Hindus of to-day is to ignore these distinctions and forcibly to enlist all these tribes within the Hindu fold, notwithstanding all the differences which undoubtedly exist between the Scheduled Tribes and the caste Hindus.

108. We have already investigated the question of Custom as a source of Hindu law. The British period saw the elimination of a great many customs diverging from the Anglo-Hindu law, because the standard of proof required was so very strict. Unless the proferred custom were shown to be ancient, invariable, certain, obligatory, reasonable and not against public policy, it had a very slight chance of being recognised. In this manner the Anglo-Hindu law, with its *dharmashastra* background, was spread more widely than it had ever been before. The only customs which have, on a wide scale, escaped this steam-roller are those which were specially gathered for the benefit of agricultural classes in the Punjab. The Malabar statutes also afford an example of customary law saved from the crushing effect of the presumption in favour of the Hindu law. But even there as we have seen Mitakshara law has been applied where the statutes are silent.

109. The "reformers" desired to make it clear that "Hindu" was not merely a religious denomination, and wanted to abolish the uncertainty. In this they have already achieved much, but far less than they set out to do. All customs were to have been abolished, but the present position is that they will to a great extent be saved. The application clauses provide that the Code, except where otherwise provided, shall apply to

(*a*) one who is a Hindu by religion in any of its forms or developments,

(*b*) any person who is a Buddhist, Jain or Sikh by religion, and

(*c*) any other person domiciled in India who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu

law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.[8]

This method of defining a Hindu will prove very helpful to the Courts, though it should be pointed out that the definition of the "Hinduness" of an illegitimate child *brought up* as a member of a Hindu group may not prove so satisfactory in the long run. But, unless they are specially exempted, numbers of tribes and castes will be governed by the Hindu law of which they have never had any knowledge. Fortunately the Hindu Marriage Act and the Hindu Succession Bill (Sixth Draft) exempt Scheduled Tribes altogether until the Government thinks fit to apply the Code to them.

110. The special difficulty that now exists regarding converts will not be removed by the terms of the "Hindu Code Bill". At present there is a controversy between the High Courts as to whether the sincerity of a conversion to or from Hinduism can be examined by the court.[9] This aspect of the matter is not touched upon. Both converts and re-converts are included within the term "Hindu" by the *Explanation* to the second section. A reference to the existing law will thus be inevitable.[10]

111. As regards the over-riding effect of the Code the current version of the fourth section is that

"Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply

to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

This very comprehensive abolition clause will have to be construed a number of times by the courts, since in a number of doubtful situations it will be essential to know how far the existing law has or has not been abrogated. The saving, fortunately, now includes marriage customs, customs relating to marriage within the degrees of sapindaship and "prohibited relationship", succession, marriage and divorce in Scheduled Tribes, customary divorces generally, divorces under Malabar Statutes, and (by a mistake) under the Baroda Hindu Act, 1937, impartible estates and all the Malabar succession laws. These are quite substantial exemptions.

112. The result, however, despite the savings, will undoubtedly be a very substantial bid for unity among Hindus and those not belonging to the minority religious groups. It is hoped that within a reasonable period the exceptions can be reduced in number, as community after community voluntarily abandons the irregular customs which are at present to be preserved. Precedents for this gradual conversion are not far to seek, and the plan is both practical and realistic.

CHAPTER IV

MARRIAGE AND DIVORCE

PART I—MARRIAGE.

The definition of marriage and its inception; nullity.

113. Marriage is something which it is almost impossible to define in legal terms.[1] This inherent difficulty has led not only to intellectual confusion (not without emotional conflicts) whenever the topic has been discussed with a view to possible reforms, but also to acute awkwardness, whenever the detailed rules of any particular system of law—such as the Hindu law—are being systematized and rationalized. Some think that marriage is an almost mystical union of man and woman, in which the couple are joined by psychological developments which take place within each of them, and become in a social sense productive of good in ways that were not open to them before they were married. It is the view of others that marriage is merely a ceremony, by which public notoriety is given to a concubinage that would otherwise have been illicit; and perhaps the word "marriage" might, according to this school of thought, be applied equally correctly to the state of affairs that persists from the time of the ceremony to the time when either one of the parties dies, or the position is broken up by a decree of divorce. "Marriage" can thus be either the commencement of a state of affairs, to which certain legal effects happen to be given, or the state of affairs itself.

114. Current public opinion in India is strongly inclined to favour a clear distinction between marriage

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and concubinage, and a high moral level is generally insisted upon amongst all the Hindu communities with any pretensions to civilization. In fact, in no other respect are the feelings of Hindus so acutely sensitive as when their concept of and belief in the importance of marriage as an institution are questioned or attacked. This is largely the work of the *dharmashastra*, which, after more than two millennia of relentless propaganda, has produced an effect which the West would unhesitatingly label "puritanical". Nor is there any trace of conscious hypocrisy in the attitude which is characteristic of caste Hindus: profession and practice keep good company with each other. Such a fact is not to be ignored when considering the proposed alterations in the law, since a violent prejudice against weakening the sanctity of matrimony has, in some parts of the world, not been inconsistent with very informal sexual relationships. Hindus are attached to marriage as an institution not because they are well acquainted with extra-marital relationships and their effects, but because they expect marriage itself to provide them with every emotional and physical security in everyday life. And this expectation has, by and large, not been deceived. Changing conditions have, however, undermined that security by forcing Hindus to abandon some of the factors, such as the early marriage of girls, which helped to produce the results of which they were until recently justly and almost uniformly proud.

115. Yet perhaps because the *dharmashastra* struggled for so long to bring about this result, overcoming meanwhile tendencies as deep-rooted as they were natural, it is not surprising that some confused thinking can be detected not only amongst the public at large, but also even amongst the authoritative texts which now represent the *dharmashastra* itself. An orthodox *shastri* would not

be inclined to admit this—for his traditional technique abhors inconsistencies and contradictions, even when these stare him in the face.

(*i*) *The position according to the shastra.*

116. It must be accepted at the outset that here, as elsewhere, it is perfectly useless to put up all *smriti* texts, or even Vedic texts, and pretend that these represent the *dharmashastra* position. Even Dr Ganganath Jha, of whose orthodoxy few have any doubts, acknowledged frankly that whatever might be an ideal view, in practice it is only the opinions of accepted, authoritative commentators and *nibandha-karas* which are respected by the learned and orthodox *dharmashastris* of to-day. Since they are the only persons actually in the continuous tradition from the last *smriti-karas*, wearing as it were their mantle, they are the only persons authorised to declare the *dharmashastra*, and historians and western-trained students of the *dharmashastra* may say whatever they choose without in any way affecting what the *dharmashastra* actually is. A very striking example of this is given by no less an authority than Mahamahopadhyaya Dr. P. V. Kane himself, who complains that *shastris* in the Deccan declare that a widow should keep her head shaven, though not a single one of the *dharmashastra* texts which they point to as their authorities will support the meanings which they give to them. The problem was well-known to the great master Kumarila, who tells us in so many words that a sentence delivered by a *pandit*, corroborated by texts of his own composition or someone else's, is perfectly useless, *even though it professed to be based upon a smriti of Manu.* Nothing is authoritative unless it is found within the living orthodox tradition, for which it is often difficult even for an historian of law to

give an explanation. The flow of this learning cannot be made to run up-stream by a reference to *smriti* texts which have been long ignored or long interpreted in a manner defying logic or grammar or both. It does not matter whether the treatment of the text is due to ignorance or preference, disregard or subtle interpretation. If one steps out of the living stream one does so at the peril of excluding oneself for ever from the discussions of the learned. Whether this is a satisfactory state of affairs it is at present quite profitless to enquire.

117. The *smriti* texts themselves in fact constitute two threads, which ran right through the law as it was expounded in early mediaeval times. Now only one thread can be seen. There were those texts which sought to recognise and satisfy natural urges: certain circumstances led to a marriage—though they might be called unapproved forms of marriage—such as the sale of a bride, a union through mutual attraction and without the consent of the parents, capture of the bride by force, and overcoming her repugnance with the aid of drugs, etc. Not only was free love recognised, and a legal effect given to acts deriving from primitive urges, but the termination of unions was provided for upon recognised grounds. On the other hand we have those texts which seek to elevate marriage to the level of a sacrament, to a union of other-worldly as well as this-worldly significance, texts which seek to satisfy the desire of families to establish noble and pure lineages, placing the institution which we now take for granted as "marriage" upon a secure foundation in religion and morals. Both these threads play their parts in making up the *smriti* picture of marriage but the latter group of texts has gradually asserted its preeminence. The commentators rationalise the conflicts that occurred and reconcile the texts that demand fidelity and lasting

attachment between husband and wife with the others in such a way that the ideal concept of marriage comes out victorious. We need not dilate upon the work of art which achieved this reconciliation, but it must be repeated that it is quite useless for us to reopen the matter of the true significance of the first group of texts. The texts defining marriage in strict terms have won the day, the others being read (if at all) subject to their paramount authority.

118. The extracting of the definition of marriage from the welfare of custom and practice that formerly existed was perhaps one of the most remarkable achievements of the *dharmashastra*. The *shastra-karas* themselves recognised four categories of unions between men and women: casual unions, such as with prostitutes, unions based upon mutual satisfaction upon a day-to-day footing, unions based upon the self-dedication of the women or their sale to the men, and finally unions which gave the female partner a special status, provided the man with offspring fully worthy of him and of his ancestors (in other words "legitimate" issue), and created a sub-division of the man's family which was fully competent in all mundane and other-worldly functions. The Aryans themselves were originally monogamous, and their essential religious ceremonies required the participation of both husband and wife, or, in some cases, the wife acted as her husband's deputy. The wife left her own family for good, her transfer to her husband's family being likened by ancient jurists to a transfer of a piece of land from one owner to another. Traces of all these sorts of union are clear amongst the mass of rules which grew up amongst the mixed Aryan and Dravidian or Aryan and Kolarian people of very early times. The last type of union, *vivaha* or *udvaha*, though originally characteris-

tic of Aryan society has triumphed intellectually and sentimentally over the other kinds of unions. It was, and still is, one of the *samskaras*, or sanctifying processes, by which a human being may be elevated from his fleshly origin to his spiritual goal. It is often called the most important of all *samskaras*. Since *samskaras* all crystallise around a ritual it is not to be wondered at that in marriage the ceremony was all-important, at least in later mediaeval times and onwards. Laterly marriage has been the only *samskara* for women and for Shudras, the fourth class of Hindu society.

119. It must be remembered that unions which were not consummated by the *samskara* were by no means necessarily destitute of legal effects. One may take as an example the marriage of a *punarbhu*,[2] who in some circumstances might have a *samskara* performed, but was "married" without a *samskara* where one had been performed on her previously: yet her children would in either case be legitimate for certain purposes. With two exceptions, however, namely the remarried widow (*punarbhu*) and the *dasi*, we are no longer concerned with any union other than that founded upon the *samskara*.

120. The *shastric* definition of marriage would seem to have been as follows: a union between a man and a woman which arises at the time when the ceremony of marriage has been completed, the bridegroom having the qualifications for accepting a girl in marriage and the bride the qualifications for being given in marriage, and the couple having formally or nominally accepted each other in front of the marriage fire, in which their oblations as a married pair will thenceforward be given.

121. The express consent of the parties was not required, the fact that they underwent the ceremony being thought more than sufficient proof of their willing-

ness to enter matrimony. Since the prime motive for marriage was the perpetuation of the legitimate family, matches were generally arranged by the guardians, and the minor bride's consent or lack of consent to a specific offer of marriage was immaterial. To this day marriage is regarded as a family matter in which the honour of the entire family is at stake, and only advanced families contemplate without horror the possibility of their daughters' being entirely free to choose their own husbands. In this respect Hindu society and societies in some parts of southern Europe are in full agreement. The great difference, however, lies in the fact that the *dharmashastra* did not regard consummation by intercourse as significant for the purposes of determining whether a marriage was validly contracted or not, except in a situation of minor importance which will be mentioned below. A Hindu marriage is generally binding whether or not "consummated", and this remains the position under the Hindu Marriage Act.

122. Repudiation of a party who was discovered to lack one or more of the necessary qualifications for marriage was, in the later law, possible only before *panigrahana*, the ceremony by which the bridegroom accepts the bride by taking her hand. Before *saptapadi*, when the bride, by walking the seven paces before the marriage fire, signifies her determination to follow her husband, some authors allowed either party to repudiate the other, but no one admitted that repudiation was possible after *saptapadi*. If, after that ceremony, it were discovered that the bride or bridegroom lacked an essential qualification for marriage nothing could be done about it, except that the bridegroom might relegate his "faulty" bride to the menial tasks of the household and marry another wife. Those authoritative writers who declared that a "faulty"

spouse might be "abandoned" even after *saptapadi* provided the marriage was not consummated by intercourse are not followed by later commentators and do not represent the current *dharmashastra* view. Curiously enough the Courts have put into effect the older, obsolete view, disregarding the later view.[3]

123. Though both ceremony and qualifications were desirable, only the ceremony was indispensable. The actual form of the ceremony, the *samskara*, might vary with caste custom, but the ceremony was worked out in some detail in their respective *sutras* for those members of the "twice-born" classes who followed each particular *shakha* of the Veda. Numerous Shudra communities have to some extent imitated all or some of the features of these traditional ceremonies.

124. Omitting some rules of a less significant character, the qualifications regarded as desirable for marriage were as follows:—

1. The bridegroom might be a widower or might have another wife living (provided that grounds authorising him to remarry were present[4]), but the bride must not only not have been married previously, or even accepted in marriage by betrothal, but must be a virgin.[5]

2. The bridegroom must be above the age of minority and must have finished his studentship, if a member of a "twice-born" class, amongst whom, therefore, the minimum age was 16. In the case of Shudras no age limit is deducible from the authorities with certainty, though 16 may also have been the recognised age for them. We know from recent history that "child marriages", where the husband was below 16, have been regarded as valid. The bride should be under the age of puberty, and might be as young as 7 or 8; marriages within a few years of attaining puberty would not be

invalid, they would merely bring sin upon the father of the bride except where a suitable bridegroom was utterly unobtainable.

3. Neither party should be deficient in a limb, or a sense. Neither should be an idiot. Incurable disease would be a grave fault.

4. Lack of sexual potency would be a ground for repudiation, though marriages of impotent men were not inconceivable.

5. The bride should be younger than the bridegroom.

6. The bride and bridegroom must be outside the degrees of prohibited relationship, which must be viewed from several angles. These rules were absolutely binding, though it is clear that whereas a *sagotra* marriage was during the British period treated as void from the beginning, according to the *dharmashastra* the alleged bride had to be maintained, though without any of the other rights of a wife.

(*i*) *Sapindaship.* According to the Benares school any girl might be married provided she were not related to the boy nor *vice versa* through her mother within five degrees of the common ancestor nor through her father within seven degrees of the common ancestor; if the boy were himself an adopted son the number of degrees might be cut down in the natural family, the adoptive family or both (there was some conflict of opinion about this); similarly where there was a difference of caste between the links with the common ancestor (when three degrees was the rule). According to the Bengal school an even larger number of relations were cut out, including the descendants to five degrees of the *matribandhus*, who consisted of a short list of maternal cognates on the mother's father's father's side and so on, and the descendants to seven degrees of the *pitribandhus*, certain cognates

on the father's father's father's or father's mother's father's side. This school admits that non-Brahmins may marry within the *sapindaship* limits provided that the girl is beyond the third degree on the mother's side or the fifth degree on the father's side. This rule is derived from an interpretation of a text (of Paithinasi) which is otherwise employed by jurists of the Benares school. The Bengal school recognises another method of evading the very strict *sapindaship* bar: if three *gotras*—*i.e.*, female links—intervene between the parties the marriage will be valid.

(*ii*) Fear of incest went even further: the bar known as *sagotraship*. In the case of "twice-born" castes, no girl might be married whose *gotra* name was identical with that of the boy. Extensions of this rule are known, whereby two *gotras* do not inter-marry, notwithstanding a difference in the names.

(*iii*) Moreover we have the closely allied bar known as *sa-pravaraship* or *samana-pravaraship*. In the case of the "twice-born" castes no girl might be married whose father's *pravara*—a group of the names of Sages supposed to be ancestors of the family, arranged in a particular order and recited at rituals—was either identical with the boy's or had such a degree of correspondence with it that two names out of three, or three names out of five agreed, irrespective of their order.[6]

(*iv*) Shastric authority exists and was followed by some jurists to the effect that marriage was prohibited with a girl whose *gotra* was the same as the boy's mother's *gotra*.

(*v*) Nor was this all: affinity could be a cause preventing the marriage. Relations by marriage such as the relations of a step-mother, also the wife's sister's daughter, paternal uncle's wife's sister and others who by a stretch

of imagination could be likened to mothers or daughters were excluded by a *viruddha-sambandha*, a relationship fatal to marital connection.[7]

7. Caste: Marriage between members of different castes or sub-castes was prohibited except by special custom. *Anuloma* marriages where the boy was of the higher caste, were very rarely so permitted; *pratiloma* marriages, where the order of castes was reversed, were always regarded, with abhorrence, as violations of nature. Not only the caste, but also the status of the family was carefully considered by guardians arranging a marriage, and misrepresentation of a party's caste or status could lead to fines or other punishments.

(*ii*) *Under the pre-1955 law.*

125. Unions other than the *samskara* type were disregarded in all cases except two: the relationship of the *dasi* is recognised so far as to enable her to obtain maintenance after her lover's death (see sec. 393 below): the remarried widow had a status equal to that of a virgin bride by virtue of the Hindu Widows Remarriage Act, 1856, which provides that ceremonies that are effective to marry a bride other than a widow shall be effective in the case of a widow also.

126. Nullity was as yet in an underdeveloped state. Impotence and, perhaps, insanity had been recognised as grounds for nullity in Bombay, Bengal and, potentially, in other States. The distinction between void marriages, which are of no legal effect from the alleged commencement, and voidable marriages, which are good until set aside at the instances of a party, was not yet clearly observed. The case-law had been of a very recent growth.

127. The requisites for a valid marriage were:—

1. The ceremony, which must be in an established

customary form. New ceremonies could not be invented, even by societies established to abolish superstitious rituals.[9] Not every part of the customary ceremony was essential to its effectiveness, but the *saptapadi* (where in use) could not be omitted without risk of the marriage being declared void.

2. In the former French India widows might marry only in a civil form. In the former British India widows could marry in the sacramental form (though this was seldom done) and by customary rites. In Bombay, Madras and Saurashtra polygamy was abolished.[10] In certain States, now Part B States or merged with Part A States, statutes similar to the Hindu Widows Remarriage Act, 1856, had been brought into force.[11] Virginity was nowhere required of the bride.

3. The Child Marriage Restraint Act of 1929, amended in 1938 and 1949, set the age of 18 for the boy and 15 for the girl as the lower limit. This Act was extended to Part B States in 1951 and thus replaces local statutes such as the Mysore Infant Marriages Prevention Act of 1894 which laid down penalties for arranging or participating in a marriage of a girl under 8 years of age. Marriages in contravention of the central statute were not invalid however: the penalties prescribed were intended to prevent "child marriages" from being celebrated. It is known, nevertheless, that many "child marriages" have been performed despite the statutes.

4. No requirements were recognised as indispensably necessary for the validity of a marriage. Even idiocy was not thought fatal,[12] though the matter was still in doubt at the time when the Hindu Marriage Act was passed.

5. Prohibited degrees:

(*i*) *Sapindaship* was scrupulously regarded, except where custom permitted the rules to be infringed. This

was very widely true, and marriages between uncles and nieces and with the maternal uncle's daughter had a very ancient history, the latter in particular being very widely practised in the Deccan and South India.

(*ii*) *Sapravaraship* had been abolished as a bar by the Hindu Marriages Disability Removal Act, 1946, which applied only to Part A States, excepting those parts of the latter which had been merged with Governor's Provinces to form Part A States. The operative words were, "belong to the same . . . *pravara*", and a question arose whether the case of a coincidence of *pravaras* in the manner mentioned above (sec. 124 (*iii*)) but without exact identity of *pravaras* might not still prove a bar. The loop-hole seems to have been left by oversight.

(*iii*) *Sagotraship* was no longer a bar, having been abolished by the same statute, in those parts of India to which the Act applied.

(*iv*) It appears that affinity was recognised as a bar under Bengal law, but the matter was open to dispute. The texts were held to be only recommendatory and not mandatory (legally binding) in Western India.

6. Caste: The bar against marriages between persons of different castes and sub-castes, which was not absolute in Bombay, was lifted very gradually. The Arya Samaj admitted members easily, and Arya Samajists could marry under a special statute irrespective of their caste. The Act of 1946, noticed above, legalised marriages between different sub-divisions of the same caste. It seems that this rather declared the law than created any new rights. But by the Hindu Marriages Validity Act of 1949, which extended to all India except Hyderabad, Kashmir, Mysore and Travancore-Cochin, no marriages were to be deemed invalid "by reason only of the fact that the parties thereto belonged to different religions, castes, subcastes or

sects." Thus Hindus and Sikhs, Sikhs and Jains might inter-marry, though it seems from the preamble to the Act that Buddhists were not comprehended in its scope. A curious difficulty remained. Some authorities believed that *pratiloma* marriages had been authorised by the Act. But the word "only" in the quotation given above would seem to exclude them, since the objections to *pratiloma* marriages are twofold, that they are between castes, and that the castes in question are arranged in the objectionable order.

128. Various customary marriages were performed, particularly in the case of remarrying widows or divorcees, which were *de facto* as good as *samskara* marriages in the current law. Though not sacramental in the ordinary sense they ought not to be distinguished from sacramental marriages. They were not "civil marriages" before the Registrar, but marriages at Hindu law. Their legal effects were indistinguishable from those which flowed from the regular *samskara*-type marriage, and the distinctions popularly recognised between the two forms were of a purely sentimental character.

(*iii*) *Under the Hindu Marriage Act, 1955.*

129. All the liberal advances of the last century have been retained, though the scheme adopted is such that all marriages celebrated under the Act are for practical purposes *samskara*-type marriages. The distinction between a marriage under the Hindu Marriage Act, 1955 and one under the Special Marriage Act, 1954, is that one may marry younger under the former, and one may escape by custom the rigor of the rules relating to prohibited degrees. Moreover a marriage celebrated under the Special Marriage Act may be dissolved more easily. Marriages of Hindus and Christians under the Indian Christian

Marriage Act, 1872, are not affected by the new Act, but it is quite uncertain whether Hindus and Christians may marry under Hindu law with Hindu ceremonies, as is possible at present under certain circumstances.[13]

It is evident from a reading of secs. 1 (2), 4 (*b*) and 5 of the Act that marriages solemnized outside India may be valid in India though invalid elsewhere—a somewhat curious effect of a well-intentioned provision.

130. The requirements for a valid marriage are:—

1. (Sec. 7) The ceremony must be in accordance with the customary rites appropriate to *either* party: they are not free to choose either a novel type of ceremony or one which is not in use in the community of either of them. The forms of matrimony are thus pegged down to the customary forms in use in 1955. When the *saptapadi* forms a part of the ceremony it marks the completion and the moment when the marriage becomes binding. We are not told when the moment arises in other cases. One wonders whether the former rule of *factum valet*, which allowed certain rituals to be omitted without invalidating the marriage[14] has or has not been abolished by the terms of sec. 4 of the Act, under which all rules or interpretations of Hindu law cease to have effect with respect to any matter for which provision is made in the Act, and the Act permits marriages only in accordance with the customary rites and ceremonies. . .

2. Monogamy is compulsory (Secs. 5, 17).

3. The bridegroom must be over 18 and the bride over 15.

4. Neither party may be an idiot or a lunatic.

5. Prohibited degrees:

(*i*) *Sapindaship*: the degrees are reduced to five on the father's side and three on the mother's except where

custom governing both the parties permits the marriage. (Secs. 5 (*v*), 3 (*f*))

(*ii*) "Prohibited relationship", which is defined in the Act, bars the marriage, unless the custom governing both the parties permits it. Sec. 3 (*g*) defines "prohibited relationship" as follows: it exists where one party is a lineal ascendant of the other; or was (whether by death or divorce) the wife or husband of a lineal ascendant or descendant of the other (thus a daughter-in-law is excluded); or was a brother's wife or father's brother's wife or mother's brother's wife or grandfather's or grandmother's brother's wife; or if the parties are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters. Relationship by half-blood, by adoption or by illegitimate blood-connection will be equally effective for this purpose. This is certainly a less formidable list of prohibited relations than was in force at law or by custom previously. There are no other requirements for a valid marriage under the Hindu Marriage Act, 1955, though to comprehend them it will be necessary to discuss the Act's concept of Nullity.

131. Nullity, of course, is a matter of void and voidable marriages: void marriages are of no effect from the beginning: voidable marriages are good in law until they are set aside on the petition of a party to such a marriage. The distinction is carefully preserved in the Act, thus remedying the defect left in the case-law. Sec. 11 explains that if a party has a spouse already living, or is caught by the bar of *sapindaship* or "prohibited relationship", the marriage is automatically void. Sec. 12 goes on to tell us that whether the marriage was solemnized before the Act or after it, it shall be voidable on the following grounds: that the respondent was impotent at the time of the marriage and continued to be so until the petition

(from which we conclude that a marriage may be valid, in spite of the terms of Sec. 5 which lays down the "conditions" for a Hindu marriage,[15] as long as a party does not petition for nullity): that the respondent was an idiot or lunatic at the time of the marriage (from which the same conclusion may be drawn); that the consent of the petitioner was obtained by force or fraud, or if she was under 18, that the consent of her guardian was obtained by force or fraud—but no petition may be filed on this ground after one year has elapsed since the force ceased to operate or the fraud was discovered or if, after the moment of discovery, etc., the petitioner consented to live "as husband and wife" with the respondent; and finally that the respondent was pregnant by somebody else at the time of the marriage—provided that the husband was unaware of the fact at the time of the marriage and the petition was filed by him within a year of the marriage or of the passing of the Act, whichever may be the shorter period, and that voluntary marital intercourse did not take place after the discovery of the pregnancy.[16]

132. It will be clear from these two sections that where the parties to the marriage are under age or the girl is between 15 and 18 and the consent of the guardian in marriage has not been validly obtained (as is required by Sec. 5 (*vi*)) the marriage is neither void nor voidable. All that the Bill says is that imprisonment may be awarded to those who procure their own marriages within the prohibited degrees (Sec. 18 (*b*)), while a fine may be imposed upon those who procure their marriages without the consent of the guardian in marriage, where required by Sec. 5 (*vi*). The impression that the marriages whose validity is in doubt are not in reality void is strengthened by the terms of Sec. 17 which directly declares a bigamous marriage void and applies the penalties prescribed

by the Indian Penal Code (sections 494 and 495) to such marriages. It follows that the marriages are not even voidable at the girl's option. This appears to be in accord with modern notions of the girl's position: once intercourse has taken place, the girl's chance of making another match are very slight in most Hindu communities.

(*iv*) *The result.*

133. Though we must admit that the *shastric* concepts have been remarkably effective in diminishing immorality and establishing marriage upon a high peak of respectability, we must also admit that customary marriages, whether in Malabar, Kumaon or elsewhere, have continued to allow situations which fall (from the orthodox view-point) short of the *samskara* standard. Even amongst very orthodox Hindus marriages in flagrant contravention of the rules regarding *sapindaship* are not only common but even regular. These facts cannot be ignored when assessing the effect of this new statute. As regards the question of polygamy, moreover, whatever the *shastra* said on the subject—it was in fact prepared to tolerate second marriages only when the first marriage suffered from recognised defects—it is notorious that Hindus considered themselves faced with the simple alternative of marrying several or only one wife at a time. This misconception of the *shastric* position, which is typical of many such misconceptions, led powerful sections of the Hindu public to clamour for compulsory monogamy. In practice polygamy was extremely rare, though not insignificant. The Act has put into effect, from the legal standpoint, a position ardently desired by large sections of the public, harmful to few if any, and, by coincidence, conformable to the *shastric* position, since, in fact, where

provisions for nullity and divorce are in vigour, there can be no harm in compulsory monogamy.

134. In other respects, indeed, the Act abandons the *shastra* as a standard, paying more substantial regard to custom and practice. One may remark that placing idiocy and lunacy upon the "voidable" (instead of upon the "void") list, and, again, the omission of nonage as a ground for nullity, are distinctly conservative steps. They accord with *shastric* notions as well as with tradition, which fears to allow a wife to be cast out upon the world without a stable future before her. The battle between instincts which seek to protect the wife against her own desires and those which see happiness only in her satisfaction will have to be fought out on the psychological plane: the law merely sets the limits to the arena with realism as its guide.

135. It is altogether difficult to sum up the effect of this Act in regard to the general definition of marriage. The insistence upon monogamy, provision for nullity, endorsing inter-caste marriages, abolition of *sapravaraship* and *sagotraship*, cutting down the degrees of *sapindaship*: all these departures from the *shastra* are in an attempt to satisfy current demand. The demand may indeed be that chiefly of an enlightened minority, to whom life is more complex than it still remains amongst the majority. The majority are still only slowly moving towards the faster-moving, better-integrated society evolving in contemporary times. It would be pointless to enquire now whether the view-point of that majority (where a single view-point can be detected only with the greatest difficulty) has been sufficiently considered in the Act. It suffices to recognise that the most substantial departures from the *shastric* law, which the majority always purport to respect without necessarily following it, were made, some as long

ago as a century back, and some within the last decade. The Act has in reality created no revolution in the law applicable in the Indian Courts.

2. *The rights of the spouses.*

136. Each spouse has a right to the affection and society of the other, unless this is forfeited. The current law has developed various remedies which may be used to protect the interests of one spouse when they are threatened by the misconduct, neglect or spite of the other. Though the remedies are foreign in nomenclature they are in reality founded upon a *shastric* basis, and not upon justice, equity and good conscience, which would otherwise have supplied them.

(*i*) *According to the shastra.*

137. The husband was obliged to maintain his wife. This was an absolute duty. The very word *bharya* makes this clear.

Until the wife reached puberty the husband could not insist upon her cohabiting with him sexually, but the *shastra* does not seem to provide rules whereby she might vindicate this immunity.

138. If the wife developed certain faults, such as harsh speech, neglect of her duties, bearing only female issue or none at all, the husband might marry again. Then the first wife would still be entitled to live with her husband, being maintained by him, and would in addition be entitled to receive a "supersession fee" equal in amount to the property settled (if any) by the husband upon his new wife. Even persistent adultery would not entitle the husband to refuse to maintain his wife so long as she remained under his roof. The scale of her maintenance would however vary with the extent and circum-

stances of her adulterous connection. Her exceptional security was due to the view that she was a possession of her husband of which he could not rid himself.

139. Apart from maintenance during his lifetime the wife when widowed was entitled to succeed to all or a part of his property, provided she was chaste when he died, that she did not remarry, and that he died a divided and unreunited member of his family.

140. She could not however abandon her husband on any grounds, even if he married again or kept concubines in the house. If he lost caste (as for example by abandoning the Hindu religion) however she was entitled to leave him until he regained his status by performing the appropriate penance. Texts which authorised the wife to seek a second husband were all counted obsolete or applicable only where the first husband was not in fact married to the wife but only verbally promised; alternatively the modern *shastris* were prepared to regard some of the texts as applying to a case where the husband was capable of being presumed dead, due to over-lengthy absence.

(ii) Under the pre-1955 law.

141. During the British period two differences crept in. Some were due to the fact that the system was administered under the general authority of the common law system, which provided nomenclature and the procedure: but the more important ones were due to a slow but definite growth in the Hindu conscience upon such matters particularly in view of the fact that arranged marriages were the rule and that hardship was the more tragic if the parties had never deliberately consented to the match.

142. The wife's right to maintenance (including residence) was not affected by anything except her deserting

her husband voluntarily and without excuse. If she absconded without his consent he was not obliged to maintain her, though as soon as she returned the obligation revived. There was a difference of opinion as to the entitlement of an unchaste wife to be maintained, particularly where her maintenance was secured by a deed or a decree of Court. Formerly no question of judicial separation could arise: the most the Courts could do was to grant or refuse a decree for restitution of conjugal rights. The Court could enforce its order for restitution by attachment and sale of the wife's property, and, in a case where the wronged party was the wife the Court could order periodical payments of money for her maintenance and could secure it by a charge on the husband's property. The defect of this scheme was that the measures were always of a temporary character and cured nothing; a wife who left for another home on good grounds could not be sure of her maintenance until the Court granted the necessary order; moreover the whole concept was arranged so that the wife might have adequate remedies against her husband, whereas in practice the husband could not equally readily obtain a quittance from an unsatisfactory wife, which he might well desire even on the basis of periodic payments for her maintenance. The practice of voluntary separation agreements was known and was recognised by the Courts, but this was not entirely satisfactory since the defects of the faulty party might hamper the entry into such agreements.

143. In the process of dealing with restitution cases the Courts built up a body of doctrine on the grounds upon which the wife could validly cease to live with her husband and yet still demand maintenance from him. For if restitution were not granted it followed that maintenance was payable, since the desertion was justified

in law. Cruelty, adultery, loathsome disease, and even insanity have been admitted as valid grounds for desertion and separate maintenance, and recently it was established by some High Courts only that not only the keeping of a concubine in the house but also the taking of a second wife was such a ground.[17]

144. Mysore State, by Act X of 1933 (extended to the Civil and Military Station of Bangalore in 1945), has codified the right to separate maintenance in the following manner (Sec. 23): a wife is entitled to refuse to live with her husband and to claim separate maintenance, in any of the following cases:

(*a*) when he is suffering from any venereal or loathsome disease ;

(*b*) when he marries a second wife ;

(*c*) when he keeps a concubine in the house ;

(*d*) when he habitually treats his wife with such cruelty or harshness as to endanger her health or personal safety ; or with such gross neglect as to make her life with him miserable ;

(*e*) when he renounces the Hindu religion.

145. These provisions are now superseded by the Hindu Marriage Act, 1955 which deals with the matter in a slightly different fashion. The Central statute on the subject was not passed until 1946: the Hindu Married Women's Right to Separate Residence and Maintenance Act. The grounds for claiming separate residence and maintenance are (Sec. 2): loathsome disease, cruelty such as renders it unsafe or undesirable for the wife to live with her husband ; desertion, namely abandoning without consent ; marrying again ; ceasing to be a Hindu by conversion to another religion ; keeping a concubine or habitually residing with a concubine ; or, finally, "for any other justifiable cause", which left much to the discretion

of the judges. It is provided that if she is unchaste or ceases to be a Hindu or fails to comply with a decree for restitution without sufficient cause she shall not be entitled to separate maintenance— a proviso required seemingly by abundant caution. It is disputed whether only grounds arising after the passing of that Act would count for the purposes of a claim under the Act.[18]

146. Judicial separation as an alternative remedy was first introduced by the Bombay Hindu Divorce Act, 1947, Sec. 4. The grounds were leprosy not caught from the plaintiff; that the wife was the concubine of another man or was leading the life of a prostitute: that the husband had married again and the second wife was then living; that he kept another woman as a concubine: or that he was guilty of "legal cruelty", a phrase the full meaning of which had not been elucidated when the Act was repealed.[19] Under Sec. 8 the Court was empowered to grant permanent alimony to the successful plaintiff, though in the case of the wife this would be payable only as long as she remained chaste and unmarried.

(*iii*) *Under the Hindu Marriage Act and the Maintenance Part of the "Hindu Code Bill".*

147. The Hindu Marriage Act, 1955, does not codify aspects of the spouses' rights against each other. The Maintenance Part of the "Hindu Code Bill" also deals with the claims that a wife may have against her husband.

148. Provisions for restitution of conjugal rights are given in Sec. 9 of the Act, and for judicial separation in Sec. 10. It is "separate residence and maintenance" which finds its place in the Maintenance Part. One may wonder what necessity there is for the very full provision thus indicated, and what significance there is in the differing grounds upon which each separate remedy may be

obtained. The subtlety is unquestionably present, though difficult to justify.

149. A decree for restitution, where one party has deserted the other, may be granted where the grounds relied upon by the respondent are found to be unsatisfactory. Since these grounds may only be such as would be grounds for judicial separation, nullity or divorce,[20] it follows that where the grounds are found to be true a situation will arise where the decree will be refused, and the respondent will be simultaneously shown to have a *prima facie* case for claiming judicial separation, nullity or divorce. It is thus clear that the Court is not left, as formerly, free to decide upon what grounds it will or will not grant a decree for restitution, its task being simplified by the statutory obligation to refuse the decree only when the ground specified under any of those three heads is found to be true. It is just possible that a ground which might have been adequate before 1955 will not fall within the four corners of the grounds set out under nullity, judicial separation or divorce.

150. Judicial separation, which is available to those married either before or after the commencement of the Act, may be decreed on the grounds of desertion for two years; cruelty such as to make the petitioner reasonably fear harm or injury if he or she continued to live with the respondent; virulent leprosy for not less than a year; communicable venereal disease not contracted from the petitioner; continuous unsoundness of mind for two years; adultery—even a single act of adultery—on the part of either spouse. "Wilful neglect" is explicitly stated to be within the meaning of "desertion". The decree of separation may be rescinded upon the petition of either spouse, provided the Court thinks it just and reasonable to do so. Alimony is available to the petitioner, so long as the latter

remains unmarried and chaste (Sec. 25). The expenses of the proceedings and maintenance while they are coming on for hearing may be ordered to be paid by the respondent, if it appears to the Court that the petitioner has insufficient means. It will be noticed that remarriage of the husband before the Act came into force is not a ground for judicial separation, and therefore for some time to come a useful provision of the Act of 1946 (see Sec. 145 above) is nullified.

151. The Maintenance Part of the "Hindu Code Bill" provides (Sec. 126 (2)) that a Hindu wife may claim maintenance from her husband only if and while she lives with him, provided that she may live separately without forfeiting her claim to maintenance—

(*a*) if he is suffering from a virulent form of leprosy or has been suffering from venereal disease in a communicable form and not contracted from her :

(*b*) if he keeps a concubine in the same house in which she is living ;

(*c*) if he is guilty of such cruelty as to render it unsafe for her to live with him ;

(*d*) if he is guilty of desertion, that is to say, of abandoning her without just cause and without her consent or against her wish :

(*e*) if he has ceased to be a Hindu by conversion :

(*f*) if there is any other cause justifying her living separately. She loses these rights if she is unchaste or *ceases to be a Hindu by conversion to another religion.*

152. It is plain that separate residence and maintenance is to continue alongside the other remedies, while a wife may be entitled to separate maintenance while at the same time she may not be able to escape a decree against her for restitution: since grounds which would entitle her to separate maintenance (*e.g.*, under the "any

other cause" clause) will not necessarily be acceptable to the Court, since the only grounds available in answer to a petition for restitution must be among those laid down in the Marriage Act under judicial separation, nullity or divorce. This anomaly will no doubt be attended to by Parliament in due course.

(iv) The result.

153. Apart from the complications due to the diverse sources from which the various remedies are drawn, it will be seen that the Act and the other provisions of the "Code Bill" together provide remedies which are attuned to current public needs. The rigorous attitude of the *shastra* seems to have been intended to protect the wife against acts or feelings on the husband's part. It has already been pointed out that the plight of an abandoned wife might be serious. Yet now the *shastra's* preoccupation with protecting the wife is obsolescent, since the husband himself may be equally in need of protection in the present situation where monogamy is to be the rule. At any rate it would be unseemly now to invoke *shastric* texts against the interests of either spouse. The large provisions for separate maintenance are a concession to orthodoxy, since it is plain that justice and equity by themselves would not oblige a husband to maintain a wife who did not care to live with him, especially where his fault was none of his own seeking, as in a case of leprosy. Yet it is not assumed that divorce is the proper answer to such problems, and those who want the minimum relief are indirectly encouraged to apply for it.

3. *The question of legitimacy.*

(i) According to the shastra.[21]

154. Since relations between men and women were

sub-divisible into a number of categories (sec. 118 above), with the *samskara* type at their head and the casual connection taking up the rear, it is natural to expect that the *shastra* would have known a complex law of legitimacy. Legitimacy itself is, after all, only a presumption of law concerning a person's relation to his father, and the ancient Hindu law was better placed than some systems in that it was possible for the child's physical relationship to the parent to be known in cases besides that of a marriage by *samskara*. There was a presumption of legitimacy in favour of the child of a woman who was married at all relevant times, though this could be rebutted by evidence of an appointment,[22] in which case the child would indeed belong to the mother's husband, but he would not be an *aurasa* son, who was defined as the son conceived in a valid marriage other than that of a marriage between a Brahman and a Sudra woman (which was apparently legal in Western India up to the British period and during that period). The presumption of legitimacy could be rebutted by evidence of adultery, and in this respect the *shastra* was somewhat unkinder than the contemporary English law.

155. For the purposes of inheritance and the giving of spiritual benefit the *dattaka* or adopted son could take the *aurasa's* place. The *paurnabhava,* or son of a twice-married woman, was not recognised as a son during this age. Yet according to custom he must have been regarded as legitimate in many castes. Sudras had the special privilege of treating their sons by permanent concubines as their heirs in default of *aurasas,* and not only a fixed share of the inheritance, but also a qualified legitimacy was undoubtedly allowed them. Their modern position could not otherwise be accounted for.

(ii) Under the pre-1955 law.

156. There is no method of legitimation known to the law yet. The *aurasa*, however, need not have been conceived during a valid marriage provided he was born during one, or within a reasonable period after its termination. The child of a widow married under the Act of 1856 was as much the legitimate child of his father as children born to that man of a genuine *samskara*.

(iii) Under the Hindu Marriage Act, 1955, and the Hindu Succession Bill.

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157. The word "legitimate" is found in Sec. 3 (g) but no attempt is made to define the term. Similarly in the Hindu Succession Bill we are told that illegitimate children shall be related to their mother and to one another for the purposes of inheritance (Sec. 3 (g)), but there again the word "legitimate" is not defined. It is to be assumed that recourse must be had to the pre-existing law for the definition. That law will be saved in this connection by the terms of the over-riding section, Sec. 4. Thus the new legislation makes no revolutionary change.

158. On the other hand the Marriage Act makes special provision for the children of marriages which are annulled. In the ordinary way, when this happens, the children of the putative marriage are bastardised, which is an uncalled-for injury to innocent people. The humane section (Sec. 16) provides that notwithstanding the nullity of the marriage, children conceived before the decree who would have been legitimate had the parents' marriage not been annulled shall be legitimate children of those parents. This provision follows similar sections in other statutes passed in other parts of the Commonwealth. But the Indian Act unlike English law and the provision (Sec. 166)

of the Baroda Hindu Act, qualifies the legitimacy conferred: the children shall not have the right of intestate succession to their parents' kindred, nor any other right in the property of people other than the parents beyond what would have been theirs had they really been legitimate. As long as legitimacy is required as a qualification for inheritance some such provision as this was inevitable in a modern statute.

(*iv*) *The result.*

159. Apart from the observation made above that the presumption of legitimacy ought in terms to have found a place in one or both of these statutes, and the natural comment that legitimation by subsequent marriage would be a practical and humane innovation to introduce, it remains only to point out that the Act and the Bill make no change worthy of comment except the provision for the protection of the children of a void or voidable marriage set aside by the Court.

Part II—Divorce.

1. *The possibility of divorce.*

160. Since divorce is, except in Bombay, Madras and Saurashtra, a comparatively novel idea to Hindus, who can conceive of it only in terms of the Islamic *talaq,* by which the husband repudiates the wife, generally without her consent, a few words on the meaning of the word "divorce" in English will not be out of place.

161. The subject has had a curious history. The English law of matrimonial causes derives largely from the Canon Law and the practice of the Ecclesiastical Courts at the time when these were merged with the King's Courts. The Canon Law[23] does not recognise the

dissolution of a valid marriage, except in the special case of a marriage between a baptized person and a non-Christian. The words *dissolutio* or *divorcium a vinculo matrimonii* apply to a state of affairs where a marriage is dissolved under the very exceptional provision just mentioned or to one which has developed outside the Canon Law in jurisdictions, such as England, where the law of dissolution has developed upon individual lines.[24] A "divorce" is not recognised by Roman Catholics to this day, though since the Canon Law had very elaborate requirements for the validity of a marriage it is possible to obtain *nullity* in very many cases where the derived systems would not grant such a decree. To give an example, the marriage of a woman to A after she had promised herself in marriage to B would be a ground for nullity at Canon Law, but not at English law, where this remedy was abolished in the 16th century. *Separatio* or *divorcium a mensa et thoro* was not a "divorce" at all, but equivalent to our judicial separation. There is a noticeable similarity between the approach of the Canon Law and the Hindu law in that judicial separation is provided for parties not able to live together in conditions shocking to the public conscience, yet unwilling to sever the matrimonial bond out of religious scruples. Now, however, Hindu law has a restricted law of nullity and has made provision for divorce, being divorce *a vinculo*—the ending of the marriage tie altogether. The English law developed, by statute, grounds upon which parties could petition for divorce, and these have been known as "matrimonial offences". It is evident that in making provision for divorce the Indian Parliament has not been uninfluenced by English experience. Yet it has not taken into Hindu law the English principle that faults on the part of the petitioner are fatal to the petition unless the Court uses its

discretion in the petitioner's favour. One would indeed have thought it irrelevant in India.[25]

162. The whole institution of divorce exists as a concession to human weakness. Where life is intolerable and there would be no desire or justification for the continuance of the marriage bond, the parties are entitled to their remedy. The English theory has all along been that collusive divorces are impossible: that is to say that grounds must objectively exist by which the couple may seek the pity and dispensation of the community, in whose interest the marriage bond itself exists. The principle is achieved by granting divorces only at the petition of one party, and securing, so far as equitable, that the other party has not collusively prepared evidence for the purpose of effectuating the other spouse's object. Divorce by mutual consent, which has been admitted in a few jurisdictions, is anathema to the English outlook, and this would appear to be the case amongst Hindus also. We must revert to this matter later, in considering an effect of registering a sacramental marriage as a Special Marriage under the Special Marriage Act, 1954.

(*i*) *According to the shastra.*

163. Just as the definition of marriage was at first broad and the *samskara* type of union was at first one among many unions between the sexes which were capable of legal effects, so the possibility of divorce was understood to exist in relation to some types of union and not to others. The final position of the *shastra* was that a marriage celebrated with a *samskara* was permanent without possibility of dissolution. The tenor of the original texts seems to have been that a man or his wife could not voluntarily repudiate each other. The texts must be read against a background of the loosest behaviour. But the

present *shastric* position ignores this historical fact and reads the texts which clearly admit divorce on certain grounds, such as impotence, becoming an outcaste, etc., as applying to another age, and not ours. The texts which lay down the permanency of the relationship between the husband and wife and their "oneness"[26] are held to apply to such an extent that even death does not release a wife from her husband, so that remarriage in any form is sinful, adulterous, and the remarriage of a widow in a *samskara* form impossible.

(ii) Under the pre-1955 law.

164. Though remarriage of widows has become legal since 1856 in most parts of India, most Brahmanical communities regard divorce with horror. Non-Brahmanical communities on the other hand regularly utilise provisions for easy customary divorces. Malabar castes are outstanding examples of this. Certain of the customary divorces amount to nothing better than divorces by mutual consent, and this is the reason why divorce by mutual consent has been provided for in the Special Marriage Act, 1954. Nevertheless customary divorces are preserved (as under the Baroda Act) and not abolished in the Hindu Marriage Act, 1955. Any Hindu couple belonging to a caste or castes where customary divorces are not available may now obtain a divorce by mutual consent, if they desire, by the process of getting their marriage registered under the Special Marriage Act, 1954, and then applying to the Court under the appropriate section of that Act.[27] This is thought to be too troublesome for the average person, and thus, for the rest, the Hindu Marriage Act endeavours to eliminate collusion.[28]

165. Divorce proper was started in Baroda (now merged with Bombay) in 1931 and the provisions were

reviewed and consolidated in the Baroda Hindu Act of 1937. Bombay passed the Bombay Hindu Divorce Act in 1947, Madras the Madras Hindu (Bigamy Prevention and Divorce) Act in 1949 and Saurashtra the Saurashtra Hindu Divorce Act in 1952.

(*iii*) *Under the Hindu Marriage Act, 1955.*

166. The provisions operate in a manner which is more consolidating than innovative. Customary divorces and divorces under the Malabar statutes, such as the Travancore and Cochin Nair Acts, are saved by Sec. 29 (2) and will not be affected until developments in the communities in question render it advisable for the local legislatures to pass reforms consonant with the Hindu Code itself.

167. A curious anomaly may make itself felt in due course. The requisites for a valid marriage have been laid down conclusively for all Hindus by this Act: thus the provisions of the various Malabar statutes relative to Marriage are *ipso facto* repealed. But their provisions for divorce are not, and the result is bound to cause some trivial but perhaps costly and troublesome confusion. The local Acts of Bombay, Madras and Saurashtra (but not that of Baroda[29]—by some oversight, it seems) are repealed.

(*iv*) *The result.*

168. In those parts of India where divorces were not sanctioned by the Hindu law the step which brings all States into line is one which was inevitable once the principle of compulsory monogamy was accepted. Thus the repugnance of this step to the *dharmashastra* is not so significant as it might appear. Moreover, the vast majority of Hindus were frankly not obedient to the *shastra* in this respect. Public morality is better served by a good divorce law than by ineffective orthodoxy.

169. It might be objected that if caste customary divorces are to be continued there can be no moral or intellectual justification for setting out grounds for divorce upon which alone those Hindus may obtain divorces who cannot claim the shelter of those customs. The answer to this would appear to be that Hindus who believe in the sanctity of the *samskara* are prepared to admit that the bond may be broken for practical purposes if the grounds are sufficiently serious, while those who now take advantage of customary divorces will in due course prefer to go to Court and utilise the general law. This has been the experience in Ceylon, where the Kandyans obtain divorces under the stricter general law, despite the fact that their own customary law allows them very easy divorces.

170. Moreover, since the majority have the advantage of the customary divorce, it would have been impolitic to attempt, as was once envisaged, to deprive them of that freedom upon purely theoretical grounds. There is no evidence that the customs have ever been oppressively used.

2. *The conditions under which divorce might be sought.*

(*i*) *Under the pre-1955 law.*

171. Customary divorces, which are often of the simplest procedure, and divorces under the various Malabar statutes applicable to the Nair, Thiyya, Kshatriya and other communities with a *Marumakkattayam* background (see sec. 360 and foll. below) will not be considered here. Compensation is a feature common to both sorts of divorce where one party is at fault and the two cannot agree to terms.

172. In Bombay no spouse might sue for a divorce

if the couple lived a married life for 20 years after attaining majority, except on the ground of desertion or that the husband keeps a concubine or that the wife is the concubine of another man or leads the life of a prostitute. The Bombay grounds were as follows:—

> Impotence from the time of the marriage until the time of the suit; lunacy for seven years before the suit; leprosy (not contracted from the plaintiff) for seven years; desertion for four years continuously; not being heard of as alive for seven years by those who would naturally have heard of it had the defendant been alive; keeping or being a concubine (as above); and the wife may sue also on the ground that her husband married again before the coming into force of the Act of 1946 which abolished polygamy and that wife was still alive.

In this list it is odd to find impotence—which is a ground for nullity—and absence un-heard for seven years —which is a ground for simply presuming the death of the absent person.[30]

173. In Madras a spouse could petition for divorce provided he or she was over 18 years of age. The grounds were more comprehensive than in Bombay. They were as follows: keeping a concubine; being a concubine or prostitute; desertion for *three* years; cruelty such as to render it unsafe to live with the respondent; incurable lunacy for five years; virulent and incurable leprosy for five years; venereal disease for five years; impotence at the time of marriage till the time of the petition; ceasing to be a Hindu by conversion to another religion; and finally in the case of the wife, she might petition on the ground that her husband married again and the wife is still living.

174. No one can seriously contend that a spouse should tolerate being married to a virulently leprous person for five years, nor one who has been an incurable lunatic for that length of time. Yet some period has to be fixed, unless we are to admit either of the objectionable results, that the spouses should be bound together for ever, or that the healthy spouse should be able to rid himself of the other upon the first onset of a serious disease.

(ii) Under the Hindu Marriage Act, 1955.

175. The grounds are retroactive, applicable to any Hindu married in either a *samskara* or other form, except under the Indian Christian Marriage Act or the Special Marriage Act.

No petition is to be presented within three years of the marriage, except in very exceptional circumstances.

The grounds are as follows:—

1. Living in adultery ;
2. Ceasing to be a Hindu by conversion ;
3. Renouncing the world by entering a religious order ;
4. Incurable insanity for three years ;
5. Virulent and incurable leprosy for three years ;
6. Not having been heard of for seven years ;
7. Not having resumed cohabitation for two years after the passing of a decree for judicial separation ;
8. Failing to comply for two years with a decree for restitution of conjugal rights ;
9. The husband having married again and the second wife still being alive ;
10. The husband was guilty of rape, sodomy or bestiality.

Of these grounds the third, seventh, eighth and tenth give scope for comment.

(*iii*) *The result.*

176. The grounds on the whole are an improvement on both the Bombay and the Madras lists. The seventh and eighth are imported from England and it would seem quite just that a spouse should be relieved of the burden of supporting a wife from whom he derives no comfort, especially if he is proposing to marry again. On the other hand these two grounds do leave a loop-hole for collusion, which the Act otherwise seeks to avoid.

177. The general provision that the spouses should wait three years[31] will be of great help, especially in the case of love-marriages, which are more affected by the temptation to seek divorce than arranged marriages.

178. The third ground is interesting because it is quite novel. Formerly if a man became a *sannyasi* he had the choice whether to take his wife with him or not. It remains the law that when this happens he is relieved of the responsibility to look after his wife, who has to be maintained out of his property, of which he divests himself upon taking to that order. The justification for allowing her divorce is that it is open to a *sannyasi* to re-enter the world, in which case she might be called upon to be a wife again : if he voluntarily deprives her of her rights as a wife that is certainly a matrimonial offence unless it has her consent.

179. In the Act generally cruelty and adultery do not operate as grounds for relief if they are condoned, and the wrongdoer has once been forgiven. For a definition of condonation and for many other ambiguous expressions in the Act recourse will have to be had to English law, whence these ideas are taken. It will be noticed that the

Act does not reproduce the English rules regarding co-respondents in adultery cases, nor does it allow the award of costs or damages (cf. Baroda Hindu Act, Sec. 150) against the third party.

180. The tenth ground is obviously intended by the legislature to free the wife from a husband addicted to abnormalities of a distressing kind, likely to deprive her of her marital rights, and also to free her from a husband who, in the case of rape, may not be incurably insane, but has given proof of serious lack of sexual balance. The phrasing of the clause, however, and the manner in which it might in possibility be abused by wives anxious to get rid of their husbands on any ground, inspires apprehension that the divorce-law has been somewhat imprudently framed in this particular. Moreover a special privilege is given to the female, since the husband is not given a corresponding remedy, though abnormalities of an equally distressing nature are not unheard-of amongst women.[32]

3. *The conditions subject to which divorce might be granted.*

(*i*) *Under the pre-1955 law.*

181. The condition of compensation which is laid down in most of the statutes of Malabar relating to divorce has already been referred to (sec. 171 above). No question of alimony arises there, since the parties can always rely upon their respective *tarwad* (house) properties (if any).

182. In both Bombay and Madras provisions were in force for the payment of alimony to the female petitioner if she was in need of support, until her remarriage, or, in the case of Bombay only, as long as she remained chaste and unmarried. The Court was authorised to pass orders

regarding the custody, guardianship, maintenance and education of minor children of the marriage and for the disposal of joint property of the couple.

183. In Bombay and Baroda remarriage was possible six months after the decree of divorce became final; Madras said nothing on the point.

(ii) Under the Hindu Marriage Act, 1955.

184. Alimony may be ordered for the husband as well as for the wife. This is to be conditional upon absolute chastity in the case of either party to whom such an award is made. The award is capable of being varied according to changes in the circumstances of the parties. Power is given to make orders with regard to the custody of children, and their own wishes are to be respected so far as possible. The Court has power to pass orders for the disposal of joint property of the spouses given at about the time of the marriage. All these powers are very similar to those given in the former State statutes. It will be remarked that the Act does not follow the English law or the Baroda Act in giving the Court power to settle property of the defendant for the benefit of the plaintiff and children of the marriage in appropriate cases.

185. Remarriage will be possible only after *one year* has elapsed from the time when the decree of divorce becomes final. This is intended partly to restrain those whose desire for a divorce is solely prompted by the desire to marry some other person. It is doubtful how far this is effective in practice, if we may judge from situations which occur in other countries where a similar rule is in force. A further object is to avoid doubts as to the paternity of children born after the decree of divorce.[33]

Conclusion.

186. Those who believe that divorce is wrong on principle are not likely to be persuaded that the Hindu Marriage Act has conferred a benefit upon Uttar Pradesh, West Bengal, East Punjab and other States which did not know divorce under the Hindu law before by extending to them provisions known and experienced in three of the major States. Those States, however, cannot but be thankful that their divorce-law has undergone a careful revision, and anomalies existing by reason of the differences between the State statutes have been ironed out.

187. Those who persist in the view that divorce is unfit for the pious Hindu are at perfect liberty to practise their beliefs. Those who have the misfortune to find themselves divorced may live on under the impression that their marriage still subsists. Those who are grievously injured by the behaviour or ill-health of their spouses may, out of a desire to obey their conscience rather than take advantage of the remedy the State has offered them, continue to serve the faulty partner as if the marriage bond were never threatened by that fault. The Act does not hamper those who wish to follow the dictates of their own consciences.

CHAPTER V

MINORITY AND GUARDIANSHIP

1. *The object of guardianship of minors.*

188. The law of guardianship of Hindu minors is almost entirely judge-made law, but it falls into two sections. On the one hand we have the Court's jurisdiction—an ample jurisdiction—to make orders with regard to the welfare of the minor, having that welfare as the sole consideration in issue. This jurisdiction is derived from the doctrine, present both in the *dharmashastra* and in the English law, that the Sovereign is the ultimate guardian of all minors. On the other hand, we have the special jurisdiction conferred upon the Court by the Guardians and Wards Act, 1890, which had been adopted to a greater or a lesser extent in most of the Princely States and has now been extended to all India by the Part B States Laws Act, 1951. This statute authorises the appointment of guardians whose powers are set out in some detail and whose proposed acts are subject to the close scrutiny of the Court. Since the statute is part of the general law of India we shall not need to examine it closely, but we shall be obliged to refer to it more than once since the attitude adopted in the Hindu Minority and Guardianship Bill is to approximate the Hindu law in this connection as closely as possible to the general law. Upon the appropriateness of such an object there can be an acute difference of opinion.

189. Guardianship falls into three chapters: guardianship of the person of the minor (which we might call the "right of custody" of the child); guardianship for the

special purpose of arranging the minor girl's marriage; and guardianship of the minor's property. Again there are always two aspects to the subject: it may be regarded as a duty devolving upon near relations, and obliging them to undertake trouble and expense, for which they are always morally and generally legally entitled to reimbursement out of the minor's property; on the other hand the position of guardian can be regarded as an office of profit. In its first aspect guardianship is a trust, in that the guardian is bound to act for the minor's and not for his own or any third party's benefit, and should not derive any advantage from his responsibility; in its second aspect, however, the guardian in practice may, and even customarily does, receive money or money's worth on his own or his family's account. The use of guardianship property, the custody of the ward's inheritance, is often popularly regarded as a source of gain, and there can be no doubt but that illicit profits have been made with impunity by unscrupulous persons out of such a source, abusing their advantage. It is even a matter of anxiety that the machinery of the law cannot take action in time to prevent the ward's property being wasted or squandered, and complaints of this kind are sufficiently often heard to make the legislator hesitate before entirely approving the present situation.

190. On the other hand, it is worthwhile bearing in mind that in many castes marriages are contracted with the aid of *shulka*[1] (a present to the bride, her parents or brothers) or with the aid of a substantial *vara-dakshina* (present to the bridegroom or his parents). It is often necessary for the greater part of the money or property passing at the time of the marriage to be retained by the parent or guardian in marriage in order to finance the marriages of unmarried daughters or sons as the case may

be. Hindus are generally strongly prejudiced against marrying until provision has been made, or can clearly be foreseen, for the marriage of unmarried sisters, and in those castes where the pernicious practice of dowry-giving still prevails the financial transactions cannot strictly speaking be regarded as illicit dealings with a minor's property.[2] They are something infinitely more complex. But what has been said above suffices to show why guardianship in marriage is more often regarded as a right than a duty, though traditionally it is really both.

191. What is the object, next, of guardianship of the minor's person and property? Custody of a young child ought always to be in the hands of those who will not stint on his maintenance and upbringing and a delicate balance has to be preserved between the desire to trust parents, or those who have to take the parents' place, to serve the child's interest with efficiency and affection, and the contrary desire to prevent children being a burden to their guardians in the sense that the latter are diffident in dealing with them lest the public interfere. One might quote as an example the case of the United Kingdom, where recently the popularisation of certain doctrines enunciated by some psychologists (perhaps without adequate authority) has led directly to parents' being afraid to chastise their children, and this has produced indiscipline and even criminality where it might otherwise have been avoided.

192. As a general rule custody of the minor's person and of his property ought to be in the same hands, not only for convenience but also because those who know the minor's resources can most easily calculate whether or not their own pockets should be dipped into on the child's behalf: this is a consideration which hardly arises when a parent is alive, but is very important when the guardian is an appointed guardian. There are obvious exceptions.

Where the minor's property is tied up with the property of others it might be foolish to separate it from their management: and where the guardian is a widowed mother who has remarried it might be advantageous for the management of the minor's property to be in the hands of a maternal or paternal relative rather than the step-father or step-brothers. Custody of the person of a female child in particular can raise questions of moral propriety also, and the public would not suffer a young girl to be at the mercy of persons who might abuse their position.

193. With regard to guardianship of property we are faced at once with an obvious need. Since the law does not permit the minor to enter into any contract which will have legal effect except it be for "necessaries", which are strictly defined with reference to the minor's own contemporary objective need, it is absolutely necessary that an adult of full legal competence should be authorised to give receipts for the minor's income and make disbursements out of the minor's assets for the latter's maintenance in the fullest sense of the word. The duty of the guardian is thus entirely adjusted to the needs of the minor, of which the guardian must make an honest and reasonable assessment. If he does so his acts will bind the minor when he reaches majority, and it is only on the ground of fraud that the minor can impeach these transactions. It will be obvious from this that what the guardian does is done in his own name, and derives its binding force through his own authorised act, but it affects the minor's property because the third party who is dealing with the guardian knows that if the transaction is honestly and competently entered into the minor cannot be heard to complain.

194. The guardian may employ a wet-nurse, send the child to school or college, lay out money for food and

clothing, medicines and entertainment, and conduct litigation in defence of the minor's rights: for all these and similar purposes he may, if absolutely necessary, mortgage or even sell the minor's immovable property. Unless such rights existed minors would be entirely at the mercy of charity, and a charity which would operate on an usurious basis. The exact definition of the guardian's powers is of the greatest importance, not so much to the third parties, money-lenders and purchasers and so on, but to the minors themselves.

195. We must leave aside for the moment guardians appointed by the Court under the Guardians and Wards Act, 1890. Besides these, guardians at Hindu Law fall into three categories: natural guardians, testamentary guardians, and guardians by virtue of spousehood. It is assumed that the first guardians of a child are his natural guardians, namely the parents; similar is the guardianship which is accepted by a person appointed in the parent's will. The husband is the guardian of his minor wife. In case the guardian acts improperly the Court has jurisdiction to remove the guardian, substitute a fit person in his place, and give directions, on the motion of the minor himself through his next friend, who may be any adult willing to undertake litigation on the minor's behalf.

196. Since, even in a land where joint families are the rule, orphans are constantly in need of protection, and since the hearts and purses of charitable people are easily touched by a child's necessity, the law of guardianship is one of very great importance and cannot be regulated with too much zeal and insight. For the child's own benefit it is necessary that he should be freely and easily controlled and maintained, without undue strain upon the person undertaking those duties, which may often be arduous, while at the same time the guardians must be sure that

any speculation or fraud on their part will be promptly detected and adequately punished. One might argue that prevention is better than cure, and this is what the Hindu Minority and Guardianship Bill attempts to secure—with apparently questionable aptness.

2. *The powers of guardians and the necessary restrictions upon them.*

(*i*) *According to the shastra.*

197. There is remarkably little to be found in the *shastra* on this subject. The King was declared the ultimate guardian of minors, and, in particular, orphans.

198. The parents' responsibility was not clearly defined ; perhaps this was regarded as unnecessary. The parent (or even the minor himself) might choose the *guru* and the entire care of the child might be handed over to that teacher for the period of education. The transfer to the *guru's* household was complete in ancient times. In modern times vestiges of the ancient viewpoint are still to be observed and in the matter of seeking an education sons still assert an independence which is somewhat strange to a non-Indian observer. In ancient times, despite the protests of jurists, the antique theory that parents could sell or give away their children was utilised to the fullest extent. To this day boys are given away in adoption, generally for their ultimate benefit, but without the supervision of the Court. Sales of children, particularly during famines, even for nominal amounts were regular even at the beginning of the British period, and cases where parents devoted a child (sometimes the fifth) as a human sacrifice are amply evidenced. These abuses have disappeared in modern times.

199. Minority according to the *shastra* ended with the sixteenth year in the case of a boy and the twelfth year in

the case of a girl. Authorities were divided on the question whether the commencement or the completion of the 16th year was meant. The *kutumbin* or *pradhan,* who corresponded to our modern "manager" of the joint family property, was entitled to dispose of joint family property in a case of necessity or under the authority of texts without reference to minors' wishes and independent of their consent.[3] *A-prapta-vyavahara* was the term used of minors, who had no legal capacity whatever.

200. At a partition of joint family property the shares belonging to minors were to be set aside in the custody of friends, village elders, or maternal relations, who could best be trusted not to forget the separate character of that property.

(*ii*) *Under the present law.*

201. Minority ceases at 16 (or 15) for the purposes of those affairs which are not yet governed by statute: in fact the Indian Majority Act, which raised the age to 18, left marriage and adoption outside the scope of the reform, but marriage is now controlled by the Hindu Marriage Act and the Special Marriage Act and a male cannot marry under 18. Adoption (as we shall see) would appear to be possible at 16, but the Courts are not agreed on the point, and boys and young widows have been allowed to adopt while much below that age. Those minors for whom guardians have been appointed under the Guardians and Wards Act do not attain majority until 21.

202. Guardianship of the minor's person and property is with the natural guardians, namely the parents. In their default testamentary guardians may be appointed by the father. Since the father is the principal natural guardian, therefore he alone can appoint a guardian by will. In default of both the Court will exercise an absolute

discretion in choosing from amongst relatives or even strangers. The nearest male agnate will probably be chosen, or failing agnates, male maternal relations. Though the father cannot be ousted from his guardianship unless utterly unfit, a mother can be ousted for immorality. Change of religion does not deprive a natural guardian of his duty, nor the remarriage of a widow, though this latter point is disputed among the Courts.

203. The husband, unless himself a minor, is the guardian of his minor wife's person and property.

204. The minor's interest in joint family property cannot be taken out of the guardianship of the manager of the joint family, where such a one exists. Thus it may be that a minor can have three guardians with unequal powers, one for his person, one for his separate property and a third for his interest in the joint family property.

205. The guardian of the minor's person has the right to delegate his powers, especially for the purpose of education, to a third party. This authority to have charge of the minor can be revoked, and the minor must be returned to his parent or lawful guardian if in the Court's opinion it is in the interest of the minor that the authority should be revoked and the revocation should be put into effect. This has on occasions led to distressing difficulties of choice for the Court and upheavals for the child.

206. The powers of a guardian are the same whether they are assumed by a *de facto* manager of the property or are claimed by the minor's lawful guardian. The whole question was settled in the leading case of *Hanooman Persaud* which was exhaustively examined in the Federal Court case of *Sriramulu* v. *Pundarikakshayya*[4] where it was held that a guardian (whether lawful or merely *de facto*) cannot bind a minor by a personal covenant, but under the Hindu law even persons having no lawful autho-

rity or title in the property may validly effect sales and mortgages of property belonging to others in certain emergent situations. The scope of the emergency is to be found out from the expressions used in the Mitakshara and in *Hanooman Persaud's case* and other cases which have followed it.

207. The *de facto* manager or guardian is simply a person who, in order to meet an emergency, undertakes to give a receipt or make a sale or grant a mortgage of the minor's property when there is not an authorised adult available to perform this necessary service. The alienee or purchaser is protected by the Court on the ground of the necessity which affects the minor or his estate, and it is the character of that necessity which is the determining feature. The lack of authority in the *de facto* guardian is not a bar to the efficacy of his act, just as it is not the authority of the natural or testamentary guardian which effects the sales or mortgages into which he enters. The whole matter, if impugned by the minor, is to be judged from the angle of the necessity.

208. The case law has laid it down that unless there is a necessity pressing upon the minor or his property, such as fear of sequestration, litigation, floods and so on, or in the minor's own case sickness, or the need to take up a scholarship in a distant place, then there is no power in anyone to alienate or charge the minor's property. The guardian certainly cannot sell the minor's property just to invest it in a more fruitful security. And this is one respect in which the powers of the guardian differ from the powers of a manager of a joint family, whose acts are nowadays tested by a slightly less strict standard. It should be noted that the powers of these guardians are fixed by law and there is no need to go to the Court to obtain authorisation.

It is of interest that a father may separate his minor son from himself at pleasure; may separate the minor along with himself from his collateral or ascendant coparceners (see below on the Mitakshara joint family); may renounce his minor son's right to take by survivorship an impartible estate,[5] though he may not renounce his minor son's ordinary coparcenary interest; and may burden his minor son's interest—to its whole extent if need be—with his private untainted debts (see below on the Pious Obligation). A mother or grandfather or any next friend may effectively sever the minor from the joint family if it is held (when contested) that the severance was in the minor's interest. A father probably cannot effect his minor son's re-entry into a coparcenary by re-union; yet he can bind his minor son by alienation of his coparcenary interest by will in appropriate circumstances. Whereas the adult coparcener's severance of status from the other coparceners is complete from the moment of declaring intention to separate, the minor's severance is effective only from the time when he sues for partition (if the Court agrees), that is to say, when his own claim for partition is being adjudicated upon, unless his next friend issued a prior notice of separation. In this context the position of the minor is more than a little confused, and contradictory decisions abound.

(iii) Under the Hindu Minority and Guardianship Bill.

209. The "Hindu Code Bill" however is animated with a desire to regularise all such dealings. Intermeddlers, such as the *de facto* manager always seemed to be, ought to be precluded from handling a defenceless minor's estate. Prevention is better than cure. Why not go even further? The natural and testamentary guardians and the husband of a minor wife had altogether too much freedom,

and the development of the country seemed to demand that the Court should have the same supervision over dealings with the property of minor in India as is the case in other countries. This point of view is forcefully embodied in the Bill.

210. Minority is to end at 18: the "reformers" have not thought fit to advance the age of majority beyond the limits laid down in the old Majority Act and the new Hindu Marriage Act.

211. The custody of a child under three is to be normally with the mother, but the natural guardian is to be the father and after him the mother. An illegitimate child is to be under the guardianship of the mother and after her the father. This is novel, since presumably there will have to be proof of paternity in order that the duty can be made out. In many cases where the child is illegitimate the putative father may have good grounds for doubting whether the child is his own, and it may not be consistent with good morals that he should have the guardianship of a minor girl.

212. If the guardian ceases to be a Hindu (it is not laid down that he shall cease to be a Hindu *by conversion to another religion*) the right to act as guardian ceases—this is the law at present only in Mysore State, it seems. Moreover, those who have finally left the world by becoming hermits or ascetics are not permitted to be natural guardians of their children. This special privilege given to such persons might not be justifiable under the Constitution. We must realise that a person who "renounces the world" may well re-enter it, and then this provision might operate unfairly and inconveniently. In the case of an adoption, as now, the right of guardianship passes to the family of adoption.

213. As regards testamentary guardians a change is

made. The father may appoint one by will, as at present. but the appointee may not act so long as the mother is alive and capable of acting. The mother is *not* deprived of her right of guardianship by her remarriage, and the widowed mother may also appoint a guardian by will, so long as her husband has not already appointed a testamentary guardian for the same minor child.

214. On marriage, as at present, a minor girl will enter the guardianship of her husband.

215. Both the powers of natural and testamentary guardians are set out in Sec. 7. These powers are defined as powers "to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate ; but the guardian can in no case bind the minor by a personal covenant." The powers conferred upon an appointed guardian under the Guardians and Wards Act, 1890, are larger in that the latter is "bound to deal therewith" (*i.e.*, with the minor's property) "as carefully as a man of ordinary prudence would deal with it if it were his own. . ." Therefore it is not impossible that a guardian might prefer to be authorised under that Act rather than under the Hindu Minority and Guardianship Bill, and the same opinion might well be held by minors themselves and third parties. Since a *de facto* guardian's authority, if based upon the current law, would be wider than that conferred by the Bill, a third party would be willing to deal with the *de facto* guardian rather than a natural or testamentary guardian. But the question is complicated by the fact that this Bill seeks to deprive the *de facto* guardian of all power to act. In fact the Bill seeks to abolish him. It is doubtful whether the provision would actually make the act of a *de facto* guardian other than voidable at the minor's option,[6] in which case the powers

of the *de facto* guardian (if not held to be abolished comprehensively by Sec. 4 of the Bill) will remain in vigour, and as long as he acts honestly and with due care and attention the third party can be sure that his act will bind the minor's estate. But all this is hypothetical because of the ambiguity of the Bill's provisions.

216. The preferability of the Guardians and Wards Act is demonstrated by the fact that the Bill, after laying down the general powers, provides that certain alienations are to be outside the power of even the natural guardian without the Court's prior consent. The new guardians are prohibited from mortgaging, charging, selling, exchanging or giving away any immovable property of the minor, or leasing it for a term greater than five years or extending beyond one year after the minor reaches majority, whichever be the shorter, unless the previous permission of the Court has been obtained. Such alienations, if without permission, will be voidable, not void. Permission will not be granted except in the case of necessity or for an evident advantage of the minor. This latter phrase does good, in the sense that it releases us from the more conservative element in the law as derived from *Hanooman Persaud's* case, which to this day prevents alienations which are in the remotest degree speculative, unless the guardian is forced into them by pressing necessity.

217. As regards the right of the guardian to authorise another person, such as a schoolmaster or missionary, to take charge of the minor, the distressing difficulties which occasionally arose during the British period may not altogether be avoided by the Bill's provisions. It lays down that the authority is revocable as a general rule except (*a*) where it is not in the interests of the minor to permit it ; (*b*) there is any other sufficient cause whereby it might not be desirable to permit it ; and (*c*) where the natural

guardian (but apparently not the testamentary guardian) has ceased to be a Hindu (? by conversion). No definition is attempted of the interests of the minor, and perhaps this is best left, as at present, to each individual judge to determine. The change of religion mentioned above is a strange reason for making an authority irrevocable: perhaps the justification for this is that the guardian on ceasing to be a Hindu loses his rights as a guardian altogether.

218. The undivided interest of the minor in joint family property (if any) is exempted from the purview of the Bill, and we shall expect that aspect of the matter to be covered in the Part of the "Hindu Code Bill" which eventually deals with the Joint Family. At present the draft Part does not cope with this question, since it ignores the manager entirely (see below, Sec. 380).

219. To the Court is reserved full power to deprive a person of guardianship if he appears not to be a fit person for the purpose.

220. Guardianship and custody of the children of a marriage dissolved or annulled under the provisions of the Hindu Marriage Act is provided for by Sec. 26 of that Act.

(*iv*) *The result.*

221. Some departures from the current law are advantageous. Enabling the remarrying widow to retain guardianship in those States where she does not now retain it; widening in some respects the guardian's intrinsic powers of alienation; giving the mother the right to appoint a testamentary guardian and to oust a father's testamentary guardian are all unquestionable improvements. To give illegitimate children into the custody of their (putative) fathers and depriving hermits and ascetics, etc., of the duty to act as guardians of their own children

in perpetuity, seem to be doubtful improvements. But forcing the natural and testamentary guardians to go to Court, and undergo expense and delay, in order to obtain permission to make alienations except leases which in the majority of cases (excluding some very valuable urban properties) will be of trifling value, seems to be a step which in the present state of India may prove disastrous. It will increase litigation, the decrease of which is one of the objects of codification to achieve. The attempted abolition of the *de facto* guardian seems equally unpractical.

222. It may be argued that the anomaly which gives Hindu Law a preference over other Indian systems ought to be ironed out: and that the scope for meddling with the property of minors ought to be cut down to the smallest possible extent. But the size of India, the remoteness of the District Court, the length of time which matters take, especially if they turn out to be contentious, and the certain result that the legal profession will be benefited more than anyone—all these considerations ought to make the legislature pause before committing itself and the nation to a possible blunder. The *shastra*, as was declared in *Sriramulu's* case, contains in this connection elements of permanent usefulness in a largely rural country, and respect for the *shastra* would seem in this instance to be the wisest course until conditions change markedly throughout India.

3. *The special right of guardianship in marriage.*

(*i*) *According to the shastra.*

223. The girl has a right to be given in marriage, and to this day it has remained the custom for families to go to the last extremity to secure their daughter's marriage: and sons are more often betrothed by their parents than allowed to make their own unaided choice: this being an

aspect of the same matter, since, as the parents of the girl must be satisfied at the appropriate time and the boy's career is the only element which is normally taken into account by either party to the betrothal contract, his wishes are not given, on the whole, more than a formal regard.

224. From the legal point of view it remains the girl whose position attracts attention. Under the Hindu Marriage Act, 1955, she may be married between the ages of 15 and 18 without her own consent being required, and marriages even below that age, though making those arranging them liable to punishment, will not be invalid. The function of guardians in marriage will remain as important now as heretofore.

225. The *shastra* provides that the following persons are the guardians in marriage of a girl in order: father, father's father, brother, a "kinsman", mother's father, and, last, mother. Another order of devolution of the authority to give the maiden in marriage is: father, brother, father's father, mother's brother, agnates, cognates, mother, remote relations. In the absence of all these the maiden might choose her own match with the King's permission. A guardian in marriage was disqualified for defects such as lunacy.

226. Sale of girls in marriage was apparently a custom that was widespread, though the *shastra* repeatedly condemns it. The Asura form of marriage was a (thinly) disguised sale, and was in use in South India among respectable castes until recent times. It cannot be said to be entirely obsolete in India at large even to-day.

(*ii*) *Under the pre-1955 law.*

227. The contract of betrothal is allowed legal effects, and damages may be obtained for the breach of it. This

rests partly upon the ordinary Indian law of contract and partly upon *shastric* texts which speak of the return of presents received, etc., when the match does not take place.

228. If a marriage took place, and particularly if it was consummated, the Court would not set it aside merely on the ground that the consent of the guardian in marriage was not properly obtained. It would be what the layman would call a *fait accompli.* The Courts justified their attitude under the maxim *factum valet*, and actually acted in conformity with *shastric* texts therein. The consent of the guardian in marriage was regarded as a formality (which in reality it was not), the absence of which would not invalidate the ceremony of marriage or deprive it of its full effectiveness to create the status we call "marriage".

229. The pre-1955 law recognised as guardians in marriage the lists given in the *shastric* texts: the father, the father's father, other kinsmen (amongst whom the Court has a free choice), and the mother, but the mother was preferred to paternal relations. According to the Bengal school the maternal grandfather and the maternal uncle were placed before the mother. The father might lose his right of giving his daughter if he abandoned his family. In the case of a minor widow, the position was not uniform. In those parts of India to which the Hindu Widow's Remarriage Act, 1856, did not apply, and remarriage by custom was available to her, guardianship in marriage either did not exist, or vested in the relations of her first husband. In British India, however, the statute provided that widows remarrying while still minors might not remarry without the consent of their fathers, fathers' fathers, or mothers, in that order, and failing any of these then brothers or next male relatives. This was the case if the former marriage had not been consummated: in other cases consent of a guardian was not required. A

marriage entered into in defiance of these provisions was not to be declared void if consummated.

(*iii*) *Under the Hindu Marriage Act, 1955.*

230. The consent of the guardian in marriage must be obtained if the girl is under 18, *whether she is a widow or not,* but it appears that the want of that consent will not render the marriage void. The parties may apply for a decree of nullity within the prescribed period and subject to the prescribed conditions (see Sec. 131 above) if the consent was obtained by force or fraud.

231. Where consent is required the following persons are in order to be approached, each in the absence or incapacity or refusal of the one before: father, mother, paternal grandfather, paternal grandmother, eldest full brother, eldest consanguine half brother*, full paternal uncle, eldest consanguine half paternal uncle*, maternal grandfather, maternal grandmother, eldest maternal uncle*. Those marked with the asterisk have the right only when the bride is living with him and being brought up by him. None of these, even a full brother, may act unless he is over 21 years of age. The European age of majority, which applies under the Guardians and Wards Act and the Indian Majority Act where the minor is a ward of Court, is chosen as more appropriate than the age of majority under the new Hindu Law for this purpose.

232. This list excludes uterine brothers and sisters, and cousins, who are universally regarded as brothers and sisters in India. In default of any enumerated person the consent of a guardian in marriage will not be required.

(*iv*) *The result.*

233. There are some unsatisfactory features. The exclusion of the near relations mentioned above seems

odd. Also the provision that in the absence of mentioned guardians the girl may dispense with consent altogether. In England and Ceylon the Court has a residual right to authorise marriage of minors, and it would seem better to allow the Court to give consent in the last result, and even, where a mentioned guardian refuses consent unreasonably, to substitute its own consent for that of the guardian. It is not clear from the terms of Sec. 6 (3) whether the refusal of a guardian to act must be complete refusal to act as guardian before the permission must be sought from the next guardian on the list, or whether the refusal may merely be to act as guardian in the instance of a particular proposal. The latter interpretation would be in favour of freedom of choice amongst young people, but perhaps such a proposition is a little ahead of its time for the greater part of Hindu society.

234. Placing the mother next after the father settles that the attitude developed in the case law supersedes the *shastric* law on the point, which would seem to be archaic.

235. If the proposed clause in the Fourth Draft (Sec. 93) is to find its way eventually into a Bill (it does not appear in either the Hindu Marriage Act, the Minority and Guardianship Bill or the Succession Bill), a splendid blow will be struck against the dowry-system and its allied abuses of which Hindu society is heartily sick. The exact phrasing of the rule may require extra thought, since one can hardly imagine daughters suing their fathers for the property in question. The Mysore Hindu Law Women's Rights Act, 1933, laid down in Sec. 10 (3) the following rule:—

> All gifts and payments other than or in addition to, or in excess of, the customary presents of vessels, apparel and other articles of personal use made to a bride or bridegroom in connection with their marriage

or to their parents or guardians or other persons on their behalf, by the bridegroom, bride, or their relatives or friends, shall be the *stridhana* of the bride.

The purpose of this is to put a stop to excessive *vara-dakshinas* and the excessive monetary considerations which apply in the arranging of Hindu marriages in the South particularly. It has not been entirely successful. Sec. 93 of the Fourth Draft contained the following, which obviously had a similar motive:—

(1) In the case of any marriage solemnized after the commencement of this Code, any dowry given on the occasion of or as a condition of or as a consideration for such marriage shall be deemed to be the property of the woman whose marriage has been so solemnized.

(2) Where any dowry is received by any person other than the woman whose marriage has been so solemnized as aforesaid such person shall hold it in trust for the benefit and separate use of the woman and shall transfer it to her on her completing the age of eighteen years or if she dies before completing that age to her heirs. . .

Explanation.—In this section, "dowry" includes any property transferred or agreed to be transferred by, or on behalf of, either party to the marriage or any of his relatives, to any relative of the other party, whether directly or indirectly, on the occasion of or as a condition of or as consideration for such marriage, but does not include any small customary presents made to the bridegroom or to any relative of either party to the marriage.

236. The "Hindu Code Bill's" attempt is no doubt a more effectively drafted one than the Mysore sub-section,

and it remains to be seen whether it will be adopted finally, and if so whether it will do anything to moderate the social evils of the systems it is intended to check. No doubt once the vicious circle is broken the castes who now insist upon large dowries will drop them readily enough. At present they look to the Government to release them from their unhappy and constantly-recurring predicament.

4. *The Court's duty to supervise the giving of minors in marriage.*

(*i*) *According to the shastra.*

237. The King was authorised to consent to a girl's marriage if no guardian could be found amongst her kinsmen. The King's duty to prevent mixture of castes put upon him the responsibility to prevent, where possible, undesirable matches.

(*ii*) *Under the pre-1955 law.*

238. The Court has at present no power, nor had it any power, to authorise a marriage to which the guardian in marriage will not consent. But it has the power to stop by injunction a marriage which is being arranged by a guardian in marriage which is obviously unsuitable, or which is being arranged by him or her under the influence of improper motives. In exercising this jurisdiction the Court has been governed by regard for the minor's welfare, but a very conservative view was generally taken. Thus if the mother during the father's lifetime proposes to marry off her daughter to a man of sixty and the father objects, the Court would issue an injunction to prevent the match from taking place ; but if the father did not object it was unlikely that a Court would interfere since such a match, if proposed and accepted by a guardian in marriage, would not be hindered by the Court unless the interest of

the minor was very plainly threatened. A leper or a eunuch would certainly not be accepted by the Court as a sufficient bridegroom.

(*iii*) *Under the Hindu Marriage Act, 1955.*

239. The former law is specifically preserved, the Act setting out the jurisdiction of the Court to prohibit an intended marriage by injunction, if, in the interests of the bride for whose marriage consent is required, it appears to be necessary to do so.

240. Unfortunately it seems inescapable that if a marriage is performed notwithstanding the injunction, the result will not be that the marriage will be void, but merely that those flouting the injunction will be liable to fines or imprisonment or both for their contempt of Court. The Legislature might well add as a ground for nullity that the marriage was performed notwithstanding the fact that an injunction against its solemnization was in vigour.

5. *The question of the conversion of minors to another religion.*

(*i*) *Under the present law.*

241. This is a very vexed subject. A Hindu boy can be given in adoption by his father, even if the latter has been converted to Islam. The Hindu guardian is at present under no obligation to bring up his child in any particular religious belief, though if his child is converted it is open to question whether the father's or guardian's duties are relaxed by reason of the conversion. Probably not, since the duty is a personal one and not depending upon religion.[7] It is not denied in any judicial authority that a minor can change his religion, and indeed both Islam and Christianity place no obstacle in the way of a child under 18 entering those faiths by baptism or pronouncing the

formula as the case may be. The question of the sincerity of a conversion is another problem, though not less difficult to solve: some Courts holding that it is significant, others that it cannot be tested in a court of law (see above, Sec. 110). It is worthy of recording that Hindus in practice greatly object to being converted because of their widely-held view that all and every religious belief and most religious practices are compatible with Hinduism. This however is not the double-edged weapon it might seem to be, since although Hindus tolerate heterodoxy among their own ranks they are not prepared to welcome defections to the ranks of other religions. Hence the somewhat strange provisions in the Hindu Minority and Guardianship Bill. It is in education that the problem is felt most keenly, and it is in that very field that litigation may arise, for which the relevant Act should be well forearmed. Many of the best schools and colleges in India were founded and are still in part staffed and maintained by Christian missionaries. These may not give specific Christian teaching to all their Hindu pupils in every case, but they do not give instruction in Hinduism upon a doctrinal basis, and would not be prepared to inculcate any Hindu belief or practice as such. The likelihood of their being deliberately forced to close their doors on a dispute of this character is very slight, especially since India is professedly a "secular State".

(*ii*) *Under the "Hindu Code Bill"*.

242. Nevertheless the definitions given in the Hindu Marriage Act, 1955, and other Parts of the "Hindu Code Bill" give some cause for alarm. Application, as we have seen (see Sec. 109 above), is confined to "Hindus" defined in a negative manner. These "Hindus" need have no positive Hindu beliefs whatever. Yet, if the guardian in marriage ceases to be a Hindu (? by conversion), his right as guardian

ceases; if a spouse ceases to be a Hindu by conversion to another religion a ground for judicial separation and even divorce arises. Religion is to be a factor at a time when it had been hoped that the main institutions of private law might as far as possible be freed from sectarian influence. The Minority and Guardianship Bill does not define "Hindu" for the purpose of depriving a guardian of his rights and duties. Will conversion to Sikhism serve the turn? Atheism might also be enough. That a child *can* be converted is admitted in the Bills when they define a Hindu for the purposes of application: if the child is converted he ceases to be amenable to the Bill, yet if his guardian becomes an atheist or is converted it would seem that the child is still subject to the Bill, but the guardian is free.

243. In the current law there is no rule, except in Mysore, by which a child is presumed to retain, as apart from taking, the religion of his guardian. Mysore, by Sec. 3 of Act XV of 1938, laid down that "the religion or caste of any person shall be presumed to be that in which he was born. A Court shall, till the contrary is shown, presume that it is for the advantage of a minor to remain in the religion or caste in which he was born." This sensible provision cuts the knot and the Indian Parliament might well follow the rule. In the application sections of the Bill we are told that upbringing as a member of a group, family, etc. will settle whether a child, one of whose parents is not a Hindu, is a Hindu for that purpose. If a child were conclusively held to be incapable of conversion until he reached the age of majority there might be some hardship in a case where the child was forced to do acts contrary to his conscience, but at least the authority of his guardians would not be in danger of being disturbed. The Courts would almost certainly not alter the guardian merely

on the ground that a minor had been converted, but the temptation to meddle would be great if the present provision remains in the Hindu Minority and Guardianship Bill by which change of religion deprives a guardian of his duty.

244. This impression is confirmed by the further provision that "it shall be the duty of the guardian of a Hindu minor to bring up the minor as a Hindu". Fortunately there is no penalty fixed for failure to carry out this duty, but a Court might feel obliged to deprive a guardian of his office if he failed to carry it out. This might in the long run greatly embarrass non-Hindu educational establishments, especially those which give education on boarding-school lines.

The whole proposition, which seems aimed at preventing Hindu boys from being converted, might turn out to be an unnecessary embarrassment, and does not fit in very well with the concept of a secular State. In every part of the "Hindu Code Bill" we come across isolated instances of this desire to keep the ranks of the Hindus undivided. Whether there is any real need for such legal provisions may well be open to doubt. If the Courts take it into their heads to interpret the spirit, instead of the mere letter, of the provision regarding the guardians' duty to bring up minors as Hindus, the results cannot be foreseen.

Conclusion.

245. One cannot comment on the effect of the Hindu Minority and Guardianship Bill in such favourable terms as the Hindu Marriage Act. Theory and sentiment have here and there got out of hand, and the more realistic approach which characterises other parts of the "Hindu Code Bill" could perhaps be applied in this context also with beneficial results.

CHAPTER VI

ADOPTION

1. *The function of adoption at Hindu law.*

246. Before we can pass on to a consideration of the intent behind the proposals embodied in the Adoption Part of the "Hindu Code Bill" (Fourth Draft) we must enquire into the part which adoption plays in India. It is well known that legally effective adoptions are *at present* impossible except to Hindus in India; one day a general adoption law will probably be enacted for all Indians, but at present we have only the specifically Hindu types of adoption before us.

247. In India adoption can be for the welfare of the adopted child, and in the majority of adoptions the eventual position of the adopted child is almost certain to be much happier than it would have been had he not been given in adoption. Some measure of parental care and a very good chance of inheriting the property of the adopting parent is secured to the child. But adoption is just as often entered into for the benefit of the adoptive parent or parents, and the point of view of the *shastra* tends to emphasise this aspect of the matter.

248. It will be readily understood that it is by no means natural or necessary that the position of an adopted child in his new family should be precisely similar to that of a natural child of that family: in fact the *dattaka* form of adoption among Hindus has in common with adoption under the English statute the unusual feature that the adoptee is assimilated to the legitimate child as far as is practicable.

(*i*) *According to the shastra.*

249. The earlier *shastra-karas* were faced by a multiplicity of customary adoptions, by which both girls and boys might be taken into the family with the result that they would obtain varying rights in the property of members of that family. The *dharmashastra* has effected a reform quite as successful as the contemporary reform of the law of marriage. Although quite a number of customary adoptions remain, the *dattaka* form of adoption (which will be described below) was exalted above all others so effectively that it has almost entirely supplanted them. The essential theory of the *dattaka* form was that a boy (girls were ignored) might be given before the sacrificial fire as a gift from his natural parent or parents to the adoptive parents or parent, in order that he might be a complete substitute for the *aurasa*, or legitimate son. The object would be that the adoptee should perform the adoptive parents' funeral rites and the commemorative *shraddhas* for paternal lineal ancestors. With this religious motive as the driving force, the *dharmashastra* was able to insist upon the adopted child being assimilated as far as possible to the *aurasa*, whose substitute he was to be, on condition that certain rather strict conditions of adoption were observed. These will be described below. The tendency of the proposed legislation is to retain most of the benefits of the scheme whilst abolishing some of the conditions above referred to.

(*ii*) *The secular position.*

250. The religious function of the *dattaka* is not at all regarded, or has a completely insignificant *legal* effect, in the customary laws of the Punjab, amongst the Jaina community, or in some cases in Malabar law. The secular

function of adoption, that it provides the adoptive parent with some one who may look after him in old age, manage the estate when the parent is too old to do so, and then, as his reward, take the property left by the adoptive parent at death, is still very much alive in all Hindu communities. Indeed, especially in Western India it is notorious that when widows adopt, their most common motive is to take property out of the hands of their late husbands' relations. It does indeed remain true that throughout India adoption serves from time to time the purposes of charity, and indigent boys are given a chance in life which would otherwise not be open to them. But the law as it exists does little to facilitate this aspect of the matter.

251. Besides the *dattaka* form, upon which we shall concentrate below, the Hindu Law knows the *kritrima* or *godha* forms particularly in a section of Bihar State, the *illatom* form known in Andhra State and some parts of Madras State, and various forms in Malabar of which the *sarva-sva-danam* form[1] operates as a practical (though not theoretical) adoption of a son-in-law, which is the nominal purpose of the *illatom* form. In all these cases the effects of the adoption are more limited than in the *dattaka* form of the *dharmashastra*; in the majority of them only a relationship between the adopter and the adopted person is set up.

2. *Who may be adopted?*

(*i*) *According to the shastra.*

252. An eldest son or an only son could not be given in adoption since such a child must continue in his natural family for the satisfaction of the ancestors. A child could not normally be adopted after *upanayana,* though there was some dispute whether particular fire-oblations might

not remove this objection. One authority allows adoption even after marriage.

253. A child suffering from disqualifications such as congenital blindness, loss of a limb, chronic disease, impotence, and so on, was not fit for adoption. The adopted son must be of the same caste as the adopter and should, by preference, be of the same *gotra*.

254. A child must, for adoption, resemble an *aurasa*, and thus the child of a woman whom the adoptive father could not have married was excluded. This rule was disregarded by many customs.

255. Illegitimate children could not be adopted because only the legitimate parents had authority to make the gift, and for the same reason adoptive parents could not give away the child in adoption.

(*ii*) *Under the present law.*

256. The objection to the eldest son or only son is no longer binding.[2]

257. In Bombay State a married man may be adopted, even after he has had issue of his own. In other States except Madras twice-born boys must be adopted before *upanayana*, but Shudras may be adopted at any age provided they are unmarried. In Madras if the *gotra* is the same 'twice-born' may be adopted between *upanayana* and marriage.

258. It is not certain whether certain disqualified children can be adopted, but almost certainly they cannot. A deaf and dumb child has been held not validly adopted.

259. The rule that an adopted son must be the son of a woman whom the adoptive father could have married is followed strictly in every part of India, except where abrogated by custom. But there are two exceptions to this: in Bombay State the adoption of a daughter's son,

sister's son and mother's sister's son alone is forbidden; everywhere Shudras are allowed to adopt even these relations. In Andhra abrogating customs do not require to be proved—judicial notice is taken of them. Some strange adoptions have been allowed in Bombay.

260. The *dvyamushyayana* type of *dattaka* adoption is still available in Bombay, Malabar and elsewhere, whereby two brothers become fathers of one son, who is the legitimate son of one and adoptive son of the other: the son inherits from both families.

261. Illegitimate and adopted children are still excluded. Orphans may not be taken in adoption except by custom (Punjab and Rajasthan).

(*iii*) *Under the Adoption Part of the "Hindu Code Bill"*.

262. The proposed rules exclude *daughters*, who at present enjoy the right to be adopted according to certain Malabar customs.

263. The only qualifications required of a boy for adoption are that he shall be a Hindu, unmarried, under 15 years of age. He must not have been adopted before. It seems that he may be the illegitimate child of his mother, where she gives him in adoption; the law cares nothing for the possibility or certainty of his being disqualified from the ritualistic point of view.

(*iv*) *The result.*

264. The "Code" proposes three novelties. These appear to be in keeping with good sense, yet an extension in favour of daughters subject to necessary safeguards of her interests might not have been harmful. The fact that the outward form of the orthodox *dattaka* adoption, the mere shell, is being retained, while opportunity is not being

taken to give fuller powers of adoption in children's interests, will be adverted to below.

3. *Who may give in adoption?*

(*i*) *According to the shastra.*

265. The father could give without his wife's consent, but the wife could not give without her husband's consent, unless he were dead or in a distant country.

266. The giver had to have ceremonial competence, *i.e.* the personal capacity to take part in the rituals was essential, except in the case of Shudras, in whose adoptions no *homa* was required. It is possible that ceremonial purity of both giver and taker was required even of Shudras. An outcaste, such as an unchaste woman, could not take part in an adoption.

(*ii*) *Under the present law.*

267. The father may give without his son's mother's consent, and the mother herself can give without her husband's consent if he be dead, provided he has not specifically forbidden her to give a boy in adoption, or if he is insane.[3]

268. An unchaste widow can give her son in adoption, and so can a remarried widow.[4]

269. A father can give his Hindu son in adoption even if he himself has become a Muslim.[5]

(*iii*) *Under the Adoption Part of the "Hindu Code Bill".*

270. A parent may give a son in adoption only after reaching the age of 18, and only if of sound mind.

271. The father may not give without the mother's consent as long as she lives and is competent to give consent, that is to say, is sane and above 18 years of age. No

other qualification is required. The mother alone may give the boy in adoption if the father is dead, has renounced the world by becoming a hermit or ascetic, or has ceased to be a Hindu (? by conversion) or is not capable of giving consent. By inference an orphan is excluded.

272. By registered deed or by will the father can effectively prohibit the mother from giving a son in adoption.

(*iv*) *The result.*

273. The amendments proposed are all in the direction of humanity and common sense. That a mother may give away her illegitimate child in certain circumstances may prove of great value. It will be noticed from Sec. 73 that the right of giving and taking an adopted son cannot be foregone by agreement. This is in the interests of the religious aspect of adoption, for which generally the "Code" shows little direct regard.

274. It is the obvious intention of the Adoption Part to abolish *dvyamushyayana* adoptions and all customary forms of adoption. Whether this is really a worthy object it is quite impossible to predicate with authority: but where these adoptions fulfil a need it might have been better to save them.

4. *Who may take in adoption?*

(*i*) *According to the shastra.*

275. This part of the law is almost entirely case-law. The *shastra* naturally insists upon the ceremonial competence of the taker as well as the giver. A man might thus adopt if of full age and undisqualified, that is to say, congenitally blind, deaf, dumb, and so on. His wife might adopt only with his consent. After his death his widow

might not adopt, except in the opinion of certain authorities. In pre-British times and in many Princely States before 1950 government licence was required before an adoption could be valid.

276. A man (whose wife or widow would be his deputy acting on his behalf and for his benefit) could not adopt if he had an undisqualified son, son's son, or son's son's son living, for the *dattaka* son was to be a substitute for an *aurasa*.[6]

(*ii*) *Under the present law*.

277. A man may take in adoption provided he has attained years of discretion, which may be as low as 14. The matter is disputed between the High Courts, but the same provision applies to a widow also.[7]

278. In Mithila (Bihar State) a widow may not adopt. In Bengal she may adopt only with her husband's express authorisation ; in Madras she may adopt with the consent of her husband's *sapindas* or a majority of the nearest of them provided he has not forbidden her to adopt, and in Bombay she has an inherent right to adopt in her husband's spiritual interests provided he has not forbidden it.

279. An unchaste widow may adopt, except in the case of twice-born: an archaism.[8] A disqualified person can adopt. But a remarried woman cannot adopt to her deceased husband, nor, of course, to herself.

280. A widow's power of adoption is suspended during the lifetime of a son, but on his death under 18 (or ? 21) unmarried her power revives. If a son dies leaving a widow of his own, the husband's widow is permanently debarred from adopting even if the younger widow dies without issue and without adopting to her own husband. This illogical rule is enshrined in a Supreme Court decision,[9] which declined to follow the High Court at Lucknow which had

applied the spiritual benefit consideration and reached the view that a widow's power of adoption cannot be extinguished in this manner.

(*iii*) *Under the Adoption Part of the "Hindu Code Bill"*.

281. A man (or his widow) cannot adopt while a son, son's son, or son's son's son lives. Even a disqualified son will prevent the power of adoption coming into existence. But if the son, etc., is not a Hindu (? by conversion) the father can, notwithstanding his existence, proceed to an adoption. The former rule that a son who marries under the Special Marriage Act leaves the family for this purpose, so as to enable his father to adopt, if otherwise qualified, has already been abolished by the Special Marriage Act, 1954. Of course one who so marries retains his right to adopt, but the adoptee will have no right of intestate succession.

282. The adoptive father must be over 18 and of sound mind. If he is married he must obtain the consent of his wife before he adopts. This is entirely new. If she is under 18 or of unsound mind then her consent is not required.

283. A widow can adopt under the age of 18[10] if her husband specifically authorised her to adopt a particular boy. A widow can adopt if her husband has not prohibited her, or if her power has not terminated, which may happen either upon her remarriage or if she ceases to be a Hindu (? by conversion) or if a Hindu son of her husband dies leaving a son, widow or son's widow. The widow's right will not revive once it is extinguished, and thus the Fourth Draft anticipated the Supreme Court decision.

Provisions regarding authority given to several widows of the same husband to adopt are purely transitional and need not be studied here.

(*iv*) *The result.*

284. The result is a curious mixture of the traditional and the archaic, on the one hand, with the modern and expedient on the other. Troublesome rules about disqualification are swept away, the widow's power to adopt is clarified and unified, and the age of adoption is raised to a reasonable limit. On the other hand it is open to the orthodox to comment that if adoption is to serve, as it undoubtedly will continue to do, a spiritual as well as a secular end, the husband or adoptive father should be entitled to adopt even when he is below the age of legal marriage, since the state of his health may lead him to apprehend an untimely death, and he may reasonably desire to carry on the line of his ancestors. This right it is proposed to take away from him. To this one might answer that a religious adoption according to the *shastra* can still be made by one who has reached 16 (or 15 according to one school) and this, if properly made, will have all the desired spiritual effects though it may be bereft by the statute of legal validity for secular purposes. If the adoptive father then wishes the boy to take family property the necessary arrangements can be made by agreement.

285. It is doubted whether the non-revival of the widow's power of adoption is really a desirable rule. It would be only proper to allow widows to adopt in certain cases where this rule, apparently on irrelevant grounds, would deprive them of it.

286. One might even go further and prophesy that in time the rule that there must be no *aurasa* son, etc., will appear otiose. Similarly orphans ought to be capable of adoption, which is impossible at present, except by certain customs, which the Part abolishes.

287. The combination of archaic and modern has pro-

duced a mixture which cannot be stable for long, since the needs of the institution of adoption itself, which exists as much for charitable as for selfish purposes, will eventually make themselves felt, and will do so the more quickly, the citadel of orthodoxy in this regard having been widely breached. The religious law could be left entirely intact, but the State might openly legislate for secular purposes, and allow orphans to be adopted, and girls, and children even when the adoptive parents have children of their own (not merely daughters of their own) living. In the case of adoption of a girl, of course, rules as to difference in age, and so on, would have to be laid down, but this is not an insuperable difficulty.

288. There ought, it is submitted, to be a provision, if the adoption of daughters is to be taken up, that adoptions for the purpose of prostitution, or for any purpose by a *devadasi,* are void, and that persons giving their daughters in adoption in circumstances leading to the reasonable apprehension that they will be led into prostitution should be subject to penalties prescribed by law.

5. *The prescribed manner of adoption.*

(*i*) *According to the shastra.*

289. In pre-British times it was usual to obtain the permission of the government, to summon relations,[11] and to carry out the adoption in front of the sacrificial fire. An actual gift of the child was made accompanied by *mantras.* In the case of Shudras these *mantras* were not required nor was the *homa* performed, but other ceremonies, such as the placing of the child in the widow's lap and so on, were performed.

(*ii*) *Under the present law.*

290. There is a difference of opinion whether an

actual giving or taking need take place. Most High Courts demand an actual delivery and a declaration that the delivery is *in adoption*.

291. The *datta-homa* may be performed long after the adoption, and its non-performance does not invalidate the adoption.

The giving and taking, where required, may be done through duly appointed agents.

(*iii*) *Under the Adoption Part of the "Hindu Code Bill"*.

292. The Fourth Draft lays down that the adoption must be completed by a physical giving and taking "in adoption" by the parents concerned or under their authority (Secs. 53 and 65). The intention that the transfer is for the purposes of adoption only would appear to be requisite, but this is not placed beyond every doubt by the wording of the sections.

293. The *datta-homa* will no longer be a requisite. Registration of adoptions will be optional, unless the State Governments order that no unregistered adoption shall be valid, which step is left to local choice.

(*iv*) *The result.*

294. With the formal abandonment of the *datta-homa* it would seem that the last trace of the religious background to the law of adoption amongst Hindus is to go. The truth seems to be that the shell will retain many features derived from the ancient concept, but the general features of the law will be nearer to popular requirements and the dictates of convenience. Much further progress along this line could profitably be undertaken, it would seem. In any event those who wish to adhere to the old forms and conditions are

entitled to do so, and nothing in the "Code" hampers the attention paid by the individual to his religious duties.

6. *The effects of adoption upon the adopted child.*

(*i*) *According to the shastra.*

295. The adopted boy received the *gotra* and *pravara* of his adopted parents and entered completely into the family. He retained however his relationship with his blood relatives to this extent that his powers of adoption (when his own turn came) were limited by reference to his normal capacity to marry in that family, and that very consideration hampered his choice of a bride, since some authorities thought that he retained his sapindaship for marriage unimpaired in his natural family, while others said that his sapindaship was to the extent of three degrees in both families.

296. His interest in ancestral property terminated as if he had died.

(*ii*) *Under the present law.*

297. No alteration is found from the *shastric* position, except that *perhaps* the degrees of sapindaship for marriage are the normal number of degrees in both families —a point which remains in doubt.

298. While the interest in joint ancestral property vanishes, the separate property of the adopted son goes with him to his new family. To this an exception is recognised in Bombay, where by an anomalous decision the property which an adopted son owns as the sole surviving member of the coparcenary, and which is for many purposes as good as separate property in his hands, is divested by the adoption and passes to his heir.[12]

(*iii*) *Under the "Hindu Code Bill"*.

299. The Hindu Marriage Act, 1955, equiparates the adopted and the legitimate (and also the illegitimate) son for the purposes of marriage. Thus the sapindaship of five and three degrees (see sec. 130 above) will apply to the adopted son equally in both families.

300. The Hindu Succession Bill does not distinguish between the adopted son and the legitimate son.

The Hindu Minority and Guardianship Bill likewise equiparates the two.

301. The Adoption Part of the "Code" lays down that his property will remain his despite the adoption, but subject to any obligations attaching to it at the time of his adoption. Thus if he happens to be the sole surviving coparcener and is liable to support the widows of deceased coparceners, including his mother, his being given in adoption will not affect the maintenance-rights of the latter and he will retain control over the corpus of that property. It would appear that his being adopted into another family will not prevent the property being partially divested in his hands if the widow of a pre-deceased coparcener herself adopts (see below, sec. 307). But this is not perfectly clear from the terms of the Section (67, Prov. (*b*)).

(*iv*) *The result*.

302. Removing the anomalous rule now in force in Bombay, this restatement of the law is a natural development. It is unfortunate that, since the Mitakshara joint family and the Dayabhaga joint family will be retained (see below, sec. 355), one of the results of an adoption will be different depending upon whether the adopted child belongs to a Mitakshara or a Dayabhaga family. There is some doubt whether it can accurately be said that the interest in the Mitakshara coparcenary "vests" in the coparcener ; if

it does, then the adopted son will take his interest with him —though whether still a joint interest or in severalty will have to be determined—but if it does not, which is more likely to be the decision, then the adopted son's interest will terminate as it does at present. At Dayabhaga law, however, the share is owned by the coparcener absolutely, and there is no question of its remaining in the ownership of the coparceners who are left when the son is given in adoption. This comment is perhaps not of very serious importance, because in the majority of cases a boy who is well-to-do is not given in adoption. Yet from a theoretical standpoint it is worthy of notice.

7. *The effects of the adoption upon the adoptive family.*

(*i*) *According to the shastra.*

303. The affiliation of the adopted son to the adoptive father is unquestioned, but it is very doubtful whether all the effects nowadays given to an adoption by a widow would have been allowed under the *shastra* as enforced in pre-British times. Affiliation to the adoptive mother is still a matter of controversy. In all probability only the wife or wives living at the time of the adoption (if by the father himself) become adoptive mothers, and pre-deceased wives and subsequently married wives are not counted. The right of the adoptive son to inherit from his adoptive mother or mothers, except in the remote category of "husband's heirs", is very doubtful indeed.[13]

(*ii*) *Under the present law.*

304. At Mitakshara law the adopted boy becomes the son of his adoptive father from the moment of his adoption or from the moment of his father's death, whichever is the

earlier. If his father adopts him he cannot question alienations made by his father, of whatever kind prior to the adoption, although it is still possible to argue that he could take advantage of the rule laid down by the Privy Council[14] that one *born* during the lifetime of one whose right to question an alienation has not become barred by limitation has himself a right to question it. For adoption is by fiction a kind of birth, and the adoptee acquires a birth-right in ancestral and joint family properties.

305. Where a boy is adopted by a man whose wife is dead, the deceased wife can be claimed an adoptive mother, and the boy will according to Madras divest any estates which vested upon the basis that there was no nearer heir prior to the adoption. Andhra takes the opposite view and does not allow divesting.[15] The wife married after the adoption can claim to be an adoptive mother, and where there are several wives at the time of the adoption the one associated with her husband in the adoption becomes the adoptive mother.

306. Where widows adopt it is the senior widow who is the adoptive mother, or that widow who is authorised by the husband.

307. Where a widow adopts the adoption relates back to the time of the father's death and all property of the father which has found its way into other hands in the meanwhile, joint or separate, will be divested and vests immediately in the son.[16] The inconvenience of this rule is obvious—sometimes a whole string of titles are invalidated. Partitions can be reopened and very shocking effects can flow from a deceased coparcener's widow's adoption.[17]

308. The status of the adopted son is one given him by law and it cannot be varied by agreement between the adoptive and the natural parents. To this an exception is

made that reasonable provision for the widow's maintenance and, perhaps, similar provision for the interests of those dependant upon the adoptive father, are valid and will bind the adopted son. Of course if the adopted son is adult he can bind himself and diminish validly his legal rights.[18]

(*iii*) *Under the Adoption Part of the "Hindu Code Bill".*

309. The general concept adopted in the "Code" is that natural (legitimate) and adopted sons should as far as possible be placed in the same position, and the Adoption Part abandons this intention only so far as to cut down the right of divesting, which is the cause of so much difficulty in practice.

310. One-half of the widow's estate is divested in favour of her adopted son : and where, we are told, she adopts after the death of a son, son's son, or son's son's son of the adoptive father and she has inherted from him as mother, grandmother, etc., then in addition she is divested of half the property she inherited in that capacity. But a difficulty arises here. If she adopts after the death of a *son's son*, for example, it would seem to follow that the predeceased son must have been married: in which case it is likely that he died leaving a *widow* : even if not, he certainly died leaving a *son*—and in either case we have a situation in which the original widow's right of adoption has terminated under sec. 61 (see above, sec. 283). Thus the Part as found in the Fourth Draft would seem to be self-contradictory. It is in fact only as *mother*, that the adopting widow may inherit and be divested to the extent of half the estate.

311. It is laid down that the estate to be divested is to be treated for the purpose of divesting as it is found to

be at the time of the adoption: the intention of this (which might be better phrased) is obviously to prevent the claims for mesne profits, for all the produce and increment which has been obtained by the heir since the death, which are found to be so inequitable at present and yet must be enforced as the law now stands.[19] An impartible estate (where these survive recent legislation) will go entire to the adopted son, as is only natural.

312. "Estate inherited . . . as the heirs of the adoptive father" is a phrase which apparently will cover the interest which the widow will take (as now) in the coparcenary property: this might be made more evident in the phrasing of the section.

313. The adoptive parents remain free to dispose of their separate property. Sec. 69 omits the word "separate" in the father's case. The result would be that it might be claimed that at Mitakshara law the father after adopting might alienate ancestral property without hindrance: but this is clearly not what is contemplated.[20]

314. All ante-adoption agreements, even those protected by the Privy Council's decision referred to above and below (secs. 308, 317), are to be void. It is just possible that agreements cutting down an adopted child's rights might be for the benefit of adopted children, and thus it is questionable whether the clause which adopts so rigid an approach is entirely suitable for India, logical as it otherwise is.

315. The Part determines who is to be the adoptive mother, allowing only the associated wife where there is a choice, or the senior among several associated wives to be the adoptive mother: the last-dying wife of a widower is to be the adoptive mother, unless the adopting father gives a clear indication that some other deceased wife is to be the

adoptive mother. If a bachelor adopts, any wife subsequently married by him is to be the adoptive mother. When widows adopt the senior is to be the adoptive mother, but if any one among several widows adopts she alone is the adoptive mother. All this seems rather unnecessary and unduly complex. It might well have served the turn of the legislator simply to have placed the wife or wives of the adoptive father, whether living or subsequently married by him during the adopted son's lifetime, in the position of adoptive mothers and left it at that. Fortunately all possibility of divesting is put beyond question by the downright Sec. 68.

(*iv*) *The result.*

316. For the reasons already stated the Part seems to confer a benefit in that it simplifies and rationalises some parts of the law relating to adoptions. But further care in drafting seems now to be called for, bearing in mind the needs that will be revealed when the ultimate draft of the Joint Family Bill is worked out.

317. Half a loaf is better than no bread, and it is almost certainly in the public interest that children whose parents cannot afford to give them a good life should be given in adoption, even if they will not find in their adoptive families exactly the same future as would have been theirs had they been born there. If this view is correct, the rule in *Krishnamurti Ayyar* v. *Krishnamurti* ought to be rather extended than reversed.

8. *The effects of the adoption upon the natural family.*

(*i*) *According to the shastra.*

318. The adopted child left the natural family as if he had died. But there were some authorities who believed

that he could, in some circumstances, and in the case of maternal ancestors always, perform *shraddha* offerings as if he were still a member of the natural family. For this reason and also because an only child could not be given in adoption it is quite certain that a father who had given his son in adoption could not adopt.

319. The disruption of family property was greater in Dayabhaga families than Mitakshara families for the reason already stated (sec. 302 above).

(*ii*) *Under the present law.*

320. A parent who has given an only child in adoption can certainly adopt another son.

Disruption of property is as in the *shastric* position.

321. Judges are fond of saying that except for the problem of sapindaship for marriage the child is completely transferred for all purposes from the natural family to the adoptive family. Dr. Kane has very correctly commented on the exaggeration which this involves. Yet for the purposes of inheritance the transfer is complete, if we reserve for the moment the debatable question of divesting. Customary forms of adoption still allow the adopted child rights of succession in his natural family, though not always as complete as was the case before his adoption.

(*iii*) *Under the Adoption Part of the "Hindu Code Bill".*

322. The father or mother who gives a son in adoption can, if the result is to leave no son, son's son, or son's son's son in the natural family, adopt a son to take his place.

323. With the special exception already mentioned, all ties in the family of birth will be considered severed and replaced by those created by the adoption.

(*iv*) *The result.*

324. By insisting upon the *dattaka* form in its simplified garb, the law has been pruned and made more intelligible. It is possible that an incidental disservice may have been done to those who now use customary forms. Carefully drafted agreements, however, will soon be adopted (by those who can afford legal advice) in order to take their place. Otherwise the Part makes no important change in the existing law.

9. *The question of invalid adoptions.*

(*i*) *According to the shastra.*

325. The *shastra* was concerned that if a *datta-homa* had been performed in respect of a child who turned out not to possess the qualifications for being given in adoption to the alleged adoptive father, the child should nevertheless be maintained by the latter. It was assumed that the gift operated as a gift but without the effect of a valid adoption.

(*ii*) *Under the present law.*

326. The *shastric* authority was followed in a few cases, but the current view seems to be that no effects whatever flow from either an adoption performed in respect of a child lacking the qualifications, or between parties incompetent to give or receive that child in adoption, or an adoption which has been induced by fraud or mistake. An adopted boy can renounce his rights but not his adoption.

(*iii*) *Under the Adoption Part of the "Hindu Code Bill".*

327. An adoption made in contravention of the Bill will be void and not merely voidable. A void adoption will not create or destroy any rights.

328. Where fraud or force or mistake, etc., are responsible for the natural parent's giving or the adoptive parent's taking the boy, there is a time limit within which a suit may be filed for a declaration that the adoption is invalid.

(*iv*) *The result.*

329. All the foregoing is most satisfactory.

Finally, it seems reasonable to comment that the opportunity given by consideration of the Adoption Part of the "Code" might well be taken for the purpose of considering the advisability of enacting an Indian Adoption of Children Act. If this step is taken, it should be possible to lay down the specifically Hindu features of adoption in the "Code", while giving all the normal effects of adoption to a child adopted under the general law. If this attitude is in fact adopted it is quite likely that the whole approach to Hindu adoptions may be altered and a return to certain *shastric* notions might be practicable.

On the other hand it might be possible to confess the complete secularisation of adoption even at Hindu law. In this case girls and orphans might be admitted, and adoption of a child even by those who have issue of their own.

Meanwhile this Part of the "Code" tidies-up the present law and removes many of its awkward and pernicious characteristics.

CHAPTER VII

THE JOINT FAMILY AND PARTITION

1. *The Joint Family and India.*

330. So much of Indian history and psychology can be understood only with reference to the place of the joint family in the life of Hindus (and of many Muslims and Christians whose ancestors were recently Hindus) that it would be foolish to under-rate the importance of the institution in present-day India. A great deal of litigation upon Hindu law problems centres upon the concept of the joint family, and the manner in which it will be treated in the "Hindu Code Bill" will to some extent be a touchstone to test the virtue of that project.

331. It would be a mistake to suppose that the joint family is peculiar to India, and a sign of backwardness. It is true that jointness of enjoyment of property is characteristic of an agricultural way of life, that it encourages thrift, simplicity of living and generosity, and that the growth of individualism which a wide variety of opportunities brings with it tends automatically to reduce people's willingness to share all the ups and downs of life. Joint ownership and joint enjoyment are difficult where sources of earning vary greatly and the difference of an individual's efforts will bring proportionate gains. But the *zadruga* of South-east Europe and South Russia[1] is an exact equivalent of the Mitakshara joint family, and forms of joint families are found in other parts of the world besides India and Europe.

332. The joint family in India can be sub-divided into a number of types and some degree of accuracy is needed

before we can understand just what the "Hindu Code Bill" intends to do with it.

333. The background to the Mitakshara joint family law, which is in practice the most important, is a mixture between a strictly patrilineal and patriarchal background which Indians owe to the Aryans and the bilineal approach which was characteristic of the Dravidians whom the Aryans conquered. The latter knew joint families in which all those who dwelt together enjoyed the produce of the farm or the business, and the sons were entitled to prevent their father from squandering property inherited from his ancestors; the former knew no such legal right, though the paternal ancestor was under a moral obligation not to deprive coming generations of the means of livelihood. In the primaeval Aryan set-up the father owned all the family property and all acquisitions were acquired for him. His family had a right to be maintained, and if he thought fit he could distribute the family property of which he alone had the right of free disposal amongst his sons. The amalgam of Aryan and Dravidian laws brought about the present situation where the father can divide his sons from him, partitioning his own self-acquired property unequally if he choose, but the ancestral property can only be divided in equal shares between the sons entitled to a share. Representation *per stirpes* amongst the issue is the technical way of describing how grandsons and so on, in the male line, might take their predeceased fathers' shares at such a partition. After the death of the father the sons might partition the property amongst themselves, having paid the father's debts and endowed unmarried sisters and provided a share for each wife of the father whose *stridhana* (see secs. 425, 427 below) was not adequate for her maintenance for life. Succession in such an agnatic group was chiefly from father to sons, and self-acquired property passed by the same rule

as the interest in the ancestral property. In default of issue the father or collaterals took, and in this way daughters received, except in the absence of every heir including male issue and widow, only their dowries and marriage expenses, and the widow herself could inherit only when her husband was not joint with some collateral at his death. Women were considered the beneficiaries of a scheme which gave ownership and responsibility only to men, and those too undisqualified.

334. The ancient *shastra-karas* were undoubtedly of the view that all males were by nature joint with their agnatic collaterals and even when a partition had been necessitated the right to reunite persisted to enable the jointness to be reconstituted. Even the right of succession of the agnates was a kind of residuary right: all that was left over when partition had destroyed the preferential right to take, as we now say, by survivorship from a joint coparcener. As long as one was *avibhakta*, unseparated, one had that right, and a complete jointness of enjoyment and unity of possession with the coparceners.

335. This ancient outlook upon the family as a property-owning unit remains as true to-day as it was a thousand years ago. Such changes as have come about because of the developments of the last century have altered some aspects of joint family life but not all. Dinners at which a hundred persons sit down are rare; households where all the sons live with their wives and children are becoming rarer; families where the sons on marriage go and set up their own establishments as a matter of course are becoming somewhat common. But all this speaks of the convenience, not the spirit of family life. In other words, although later marriages are making it impossible for the mother-in-law to wield such influence in the home as she did, and autocratic management by the eldest male is no longer accepted as the

natural order of things, the sense of common rights over ancestral property and even acquisitions is as alive as ever, however many exceptions may be admitted to it in practice in individual families. The psychological position which admits a feeling that my brother's chattels and mine are interchangeable and that my needs are as much a concern to him and, if necessary, a charge on his possessions as his own is almost universal except among extremely sophisticated Hindus. This notion is carried to lengths which the non-Indian would consider strange: cousins (who are so often called "brothers") and even (in extreme examples) relations by marriage are entitled to limitless hospitality upon the basis that the owner of property is in any case only a trustee for his relatives.

336. It is because of these psychological and social facts that it is dangerous to attempt to abolish by legislation a legal feature which at least facilitates the attention of individuals to what they conceive to be their duty. Individualism comes easily enough, and the law will not be required to assist its advance.

2. *The patrilineal joint family and the matrilineal joint family.*

337. A word of explanation is required before we can pursue our analysis of the situation. We have already seen that there are systems of *succession* in India which are patrilineal, bilineal and matrilineal: this means to say that title to succeed to the property of a deceased intestate person exists in favour of those connected through the male line, male relations, exclusively (this is patriliny); through both the male and the female lines (this is biliny, and is the situation usual amongst Europeans and Americans); and through the female line, female relations, exclusively (this

is matriliny and is confined practically to India and Africa, though examples amongst primitive peoples in America and South East Asia are not wanting). But families, as joint families, generally fall into only two classes, patrilineal and matrilineal. In the first class the joint property consists of ancestral property derived from male lineal ancestors together with accretions (which may be difficult to define in a highly sophisticated society); in the second case the joint property was derived from female lineal ancestresses or from their male collaterals, that is to say from the grandmother, maternal grand-uncles, mother, maternal uncles, and so on, together with accretions and accessions as before. In both cases membership of the family is by birth, though rights may be obtained by marriage or adoption, and the rights so acquired are ended by partition, where applicable. In ancient times many persons were disqualified from enjoying any other right than mere maintenance. That situation has been largely modified during this century.

(1) *The types of patrilineal joint family to-day.*

(*i*) *The Dayabhaga joint family.*

338. This form of joint family can arise, from the property aspect, only when, after the death of a paternal lineal ancestor, his male descendants, and their transferees, hold undivided the inheritance which passes by intestate succession. Where a father disposes of property, even ancestral property, by will, no legal jointness can ensue, except to the extent that the testator makes it a condition of heirship. In fact, though they may be separate as to property, as where sons take bequests from their father in the ordinary way, it is quite common for them to live together and to share a common household pooling their resources. The feeling of joint living and performing various social and

religious duties jointly is not lost, though from the legal point of view no true joint family exists.

339. The Dayabhaga joint family is the most primitive type simply because the father is regarded as the full owner of any property which reaches him, and the sons and others have no birth-right in ancestral property of which they can make any practical use. The pure patriarchal system envisaged by Manu is still in force in Bengal and Assam, where the *Dayabhaga* of Jimutavahana (c. 1100) is still an authoritative book. Ownership of the sons, if they succeed to an intestate father, is, as long as they remain unseparated, fractional, and they are called, in English legal language, tenants-in-common. This means that if one dies, his share is taken by his heir, and there is no complication, as in Mitakshara law, on account of conflicting claims of widow or daughter and the coparceners. The law as to acquisition and powers of the manager is similar to that in Mitakshara law and therefore will be dealt with below. Because of the separateness of ownership problems of joint family law are far fewer in the Dayabhaga system, and consequently the "reformers" are not as incensed with that system as with the Mitakshara system, which many of them wished to destroy.[2]

(*ii*) *The Punjab customary family.*

340. The recorded customs of the various districts of the Punjab have a *prima facie* evidential value and are presumed to be binding upon the inhabitants whatever their religion. Agricultural classes in particular are so bound, while non-agricultural classes domiciled for the most part in the cities of the Punjab are generally bound by the personal law, that is to say the Mitakshara. There are two peculiarities about the Punjab customary law of the joint family which deserve mention here. Firstly, the sons are not

entitled to enforce a partition even of ancestral property without the consent of their father, and secondly when a partition takes place there are many districts where certain castes invariably divide the property not, as elsewhere, by heads in the first generation and then *per stirpes*, so that sons, for example, take equal shares, no matter whether they were born of one or several mothers, but according to mothers (*chundawand*) so that the sons of one mother take, say, a half between them, while the sons of the second wife take the remaining half between them, irrespective of how many sons each mother had. This method of partitioning ancestral property is well-known to the *dharmashastra* as *patni-bhaga*, and was the rule kept in mind when our complicated rules of reunion were framed, but it has been obsolete for more than a thousand years except in certain parts of India by custom, particularly, of course, in the Punjab.

(*iii*) *Malabar customs.*

341. In the Malabar coast there are families of all three sorts, patrilineal, bilineal and matrilineal. The patrilineal families are divided into three classes, the Mitakshara families, the Malayala Brahmin families and the non-Brahmin families which nevertheless follow the general law applicable to Malayala Brahmins. The situation is not identical in South Kanara and North and South Malabar (Madras State), or in the Cochin or Travancore components of the Travancore-Cochin State. The Malayala Brahmins are chiefly represented by the Nambutiris (or Nambudris), and by "Nambudri law" is generally meant that law which is applied by statute to true Nambudris and their fellow Malayala Brahmins and also the other patrilineal castes whose family law is similar. The chief characteristic of the Nambudri law, the ancient rule which totally prohibited

partitions, and secured minimal fragmentation of property by preventing any but the eldest son from marrying in the *vivaha* (*samskara*) form, has been only partially abolished, with the result that there are quite serious restrictions upon partition. In Travancore partition is still impossible unless every member of the *illom* (or joint family) consents. In Madras State partition is allowed, but the share obtained is a share *per capita*, and the husband and wife take their shares together and cannot separate them from each other.

342. Throughout Malabar the position and duties of the *karnavan* or manager are laid down by the relevant statutes.

(*iv*) *Miscellaneous customs.*

343. Certain communities of Kumaon and adjacent regions within the foot-hills of the Himalaya still practise the primaeval fraternal polyandry, but the joint family is patrilineal. Despite the contrariety of the custom to Hindu beliefs the persons so governed are unquestionably Hindus. The children of the brothers by their joint wife inherit the interests of both or all brothers in ancestral property, and though they can divide if they wish after the death of their fathers, they may perpetuate the undivided position by following their fathers' precedent and marrying but one wife between them.

344. In the Tamil country it is generally accepted that the Mitakshara law applies to all. Suspicion is felt however that the Nattukkottai Chettiar community and some other commercial castes have a peculiar régime distinct from the Mitakshara system. This has been denied in two recent cases in the Madras High Court, but the suspicion that they live subject to a distinct custom is not altogether removed. It seems that the law of survivorship does not attach to property acquired out of a nucleus provided by family

funds, nor are the married coparceners entitled to maintenance in the same fashion as Mitakshara coparceners. For details of the customs claimed to exist reference should be made to the customs in question,[3] which are said to exist on account of the community's habit of acquiring profit at the cost, if necessary, of the very basic theory of jointness itself. It is not entirely pointless to comment that the Tamils of Ceylon have never known, so far as we can tell, the full effect of the Mitakshara theory of the joint family, and no traces of jointness, except of a sentimental kind, are to be found amongst them to-day.

(v) *The Mitakshara joint family.*

345. The special peculiarity of the Mitakshara joint family is that the sons, son's sons, and son's son's sons, have a right by birth in the property of their ancestors in the male line when it has reached the hands of a nearer ancestor in the same line. In other words, while the father may deal with his own acquisitions as he chooses, the property which he inherits from the grandfather (except by virtue of a bequest not subject to a condition in favour of the sons) is held by him as joint family property and he may not alienate it without just excuse, and his sons may demand a share in it proportionate with his own at their discretion. The only sons who are debarred from obtaining their share are those who are congenitally insane, and, in Bombay only, sons who are joint with their father *and* an ascendant or collateral of the father, unless the father consents to the partition.

346. At partition, which happens by the unilateral unequivocal[4] declaration of intention to separate (which need not reach the ears of all the other coparceners before it takes full effect), the coparcener's right to take by survivorship from his other coparceners when they die the interest

which they held by virtue of their birth (or adoption, which is a fictitious birth) is terminated. This right of survivorship is a characteristic of the Mitakshara status of coparcener. All the coparceners own all the joint family property, and thus the removal of one by death or by being given in adoption, or by marrying under the Special Marriage Act, 1955, or by being converted to another religion, has the effect of making the remainder owners of the whole, as before, but having larger presumptive shares.[5] The other characteristics of coparcenership are jointness of possession of the whole property which they own, and the right to be maintained out of it, without distinction on account of variety of needs.

347. On partition the shares are determined according to the *per stirpes* rule, with representation. The High Courts are divided as to how shares should be determined when several partitions have taken place in the family and there are two or more branches. Madras and Mysore[6] take the correct view, that the previous partitions should be taken into account: Bombay takes the other view that, since no coparcener can say that he owns a specific share until he separates (a proposition that is only very generally true), each partition must be worked out upon the supposition that the entire property must be divided *rebus sic stantibus*, that is to say, taking into consideration only the situation as it is at the moment. Inequalities may happen by other means. The *dasiputras*, that is to say the sons of men by concubines who were exclusively kept by them at the time of the sons' conceptions, of Shudras only, are entitled to a half share against legitimate sons, with whom they can form a coparcenary and from whom they may take the whole by survivorship. The position of the *dasiputra* is very complicated.[7] Adopted sons, if of the twice-born castes, take one-third of the property at Dayabhaga law but one-

fourth according to most of the High Courts at Mitakshara law, while according to the remainder they take one-fifth. If Shudras they share equally with the after-born *aurasa* son in Bengal and Madras, but not elsewhere. A further ground of inequality has not yet been pronounced upon by the courts but almost certainly exists. Children born of wives of different castes will share unequally because the old law on the point has been revived since inter-caste marriage was made generally valid by the Act of 1949, confirmed by the Hindu Marriage Act, 1955.

348. After partition the sons may have to reopen the partition in three contexts in particular: (1) the adoption of a son by the widow of a predeceased coparcener, which son may demand mesne profits as well as his father's presumptive share; (2) the payment (with contribution if necessary) of the father's private untainted debts contracted before partition, or revived by him after partition though they were time-barred against him at the time of the partition—for such debts are binding upon the sons under the Pious Obligation (see below); and (3) the settlement upon a son of the father conceived after partition, if the father had at the partition not taken for himself his proportionate share to which he was entitled.[8]

349. At a partition the coparceners other than the manager (*karta*) may obtain credit for amounts they have spent for joint family purposes out of their own separate and self-acquired properties, but the manager himself cannot do this if his advance to the joint family was made more than three years before the partition because the Limitation Act bars his claim.[9]

As soon as the partition is effected by metes and bounds mothers, step-mothers, grandmothers and even step-grandmothers may generally be entitled (unless they have taken *stridhana* to a larger amount from their

husbands or fathers-in-law) to shares along with their separating descendants or step-descendants. All the Courts are agreed that this right exists to secure their maintenance, but the widest disagreement prevails as to the circumstances in which they may claim it.

350. The position of the manager is not laid down in any statute but is crucial and of the utmost importance. For the coparceners and the dependants of the joint family to live happily it is essential that a person should be authorised to manage the property for the benefit of all, to give receipts for income and to make expenditure, to invest and to give members of the family what they require for their normal purposes. The law presumes that the oldest coparcener is the manager, but the position is held subject to the agreement, in practice, of all the coparcenary body. A widow cannot be a manager, except in Nagpur (Madhya Pradesh) and Travancore-Cochin, because her husband's interest which falls to her under the Hindu Women's Rights to Property Act does not carry with it the status of coparcener, and (though this has been denied) the manager has to be a coparcener and an adult in order to enter validly into all the needful transactions. Because his authority is derived from the trust of the coparceners, who, if they did not trust him, would exercise their inalienable right to separate, the manager is not liable to be called to account for his acts, except where, in a partition suit, the Court is satisfied that he has misappropriated joint family property, in which case he may be ordered to bring its value into account.[10] Minor coparceners' interests are permanently within his guardianship, provided they remain joint, and they are bound by his acts, provided they are valid, and even decrees passed against the joint family because of the gross negligence of the manager cannot in some States be set aside in their favour.[11]

351. The manager may alienate for value joint-family property for the benefit of the family, to meet any pressing necessity, to perform customary religious obligations or to make reasonable donations for religious purposes. Sales, mortgages and exchanges undertaken for a possibly speculative motive are liable to be set aside by the Court on the application of coparceners not consenting to the transaction. The test is apt to be severe, and the Courts have not agreed as to exactly what is and what is not within the manager's powers. Even coparceners conceived after the alienation may question its validity provided they were conceived during a period when a person who had a right to question it was alive and his right had not been extinguished by the operation of the law of limitation.[12]

352. The father may alienate joint family property effectively, if the only persons entitled to question it are his male issue, even when there is no justification in law for the transaction, so long as there was an antecedent untainted debt for the satisfaction of which the alienation was made. Some courts adhere to the logically perverse view that antecedency is not required and that a mortgage alone will be binding upon the sons, etc., under the Pious Obligation.[13] The point of the Pious Obligation is that male issue are liable to pay the private debts (even if unliquidated, that is to say, of an unascertained amount) of their father, etc., provided that the debts are not tainted with immorality or illegality,[14] and to the extent only of their interest in the joint family property. Even Ezhavas and Thiyyas in Malabar are subject to this obligation.

353. In South India only, coparceners may alienate their undivided interests for value. Gifts are void. The alienee takes at most the proportionate presumptive share at the time of the alienation, but can exercise his remedy by suing for partition, and must take the share given him out of the

property as it exists at the time of his suit. In Bombay he may sue within six years of his alienor's death: in Madras he must sue within twelve years of the mortgage or sale.[15] This extraordinary breach of the ordinary textual Mitakshara law is not tolerated in Northern India, but even there so long as attachment has been obtained through the Court before a coparcener debtor dies, his interest can be compulsorily sold to pay his creditors, and if he dies after attachment the right of survivorship owned by his coparceners is defeated *pro tanto*. In Travancore-Cochin it is not even necessary to attach before the death, since it is believed that the interest passes by survivorship but burdened with the debts.[16] The High Courts squabble over what happens when the interest is decreed to be sold by auction before the death of the debtor and execution is completed afterwards, and even where the debtor dies after attachment but before decree.

(2) *The technical inconveniences of the Mitakshara system.*

354. The following complaints are made about the current Mitakshara law, and all of them are justified so far as they go:—

(*i*) The primitive rule of survivorship has been interfered with by (*a*) the right of the creditor to attach, (*b*) the right of the Official Assignee or Receiver to take the interest *plus the right to take by survivorship from coparceners who die before the insolvent* upon an adjudication in insolvency; (*c*) the right of an alienee of an undivided interest in South India to work out his anomalous rights by a partition suit against all the coparceners; (*d*) the operation of the Hindu Women's Rights to Property Act. 1937, which gives rise to anomalous situations, her interest being in some ways like and in some unlike a true coparcenary

interest;[17] (*e*) the operation of the Estate Duty Act, 1953, which causes the interest[18] to "pass at death" : and (*f*) there is the anomalous position of the murderer.

(*ii*) Alienations for value of an interest may be valid but gifts are not.

(*iii*) The whole matter of acquisition of joint family property is in confusion. The Gains of Learning Act, 1930, has made it sure that earnings from a profession are the separate property of a coparcener, provided that he does not throw them into the common stock, but what of gains made out of a nucleus supplied by the joint family? Upon this point decisions have been anomalous. The general principle that everything which is earned at the expense of joint family funds is joint family property has been infringed more than once, and a clear picture of the position is impossible. The presumptions concerning acquisition where there is insufficient evidence as to the facts are highly artificial.

(*iv*) The manager's powers are a trap. Even though the Privy Council in 1856 laid down in *Hunooman Persaud's case* the general principles for the protection of the third party, who *bona fide* buys or takes a mortgage from the manager, the law is very intricate. The law as to manager's limited powers in the case of opening a new business is very awkwardly applied: the managers' powers where the families are trading families are much wider. Joint family businesses are treated as ordinary joint family property, but the powers of their managers are not scrutinised so closely and the liability of coparceners is confined to those actively concerned in the management of the business in question. Many subtle distinctions have constantly to be made.[19]

(*v*) The whole question of the Pious Obligation is complicated and grossly artificial. The definition of *avyava-*

harika debts, which are not binding upon the male issue, is still very much in doubt after more than a century of constant litigation. Mere immorality may sometimes be enough: at others no amount of immorality short of actually criminal liability is noticed. Fine distinctions here again form a trap for the unwary. As has been shown above, the Courts are not agreed as to the necessity for true antecedency in order to support an alienation.

(*vi*) The law of partition operates unfairly with regard to the rights of succession to the *separate* property of the father: the unseparated son is preferred to a separated son, though the latter has had an advance only out of ancestral funds. This rule, based upon a misunderstanding of the Mitakshara text, is observed everywhere except in Oudh.[20]

(*vii*) The law of survivorship and the right to be maintained by the labour of another coparcener encourage idleness and discourage enterprise. The rules hampering the free alienations of the father in particular or any enterprising manager are fitted to an ancient agricultural form of life and not to the present age.

(3) *Can the Mitakshara joint family be retained?*

355. The party among the "reformers" which desires to abolish the Mitakshara joint family reigned unchallenged until 1951. Thenceforward it has been admitted that the Mitakshara should not be abolished but should merely be modified. The great causes of litigation and uncertainty should be uprooted, and the result might be workable and satisfactory.

356. Alienation of undivided interests is justifiable on the ground that it allows coparceners to remain joint, which on sentimental grounds is preferred, while the individual may raise money on his credit as a coparcener. If all coparceners were forced to separate before mortgaging or

selling their shares a great deal of legal awkwardness would be saved. Theoretically this is the answer to that problem. But in practice the exceptional right allowed in South India since the beginning of the last century is useful, if awkward, and ought not to be abolished. Rather, it ought to be extended to Northern India. It is not so much that coparceners cannot live jointly while being separate in estate, for this happens frequently and very happily in Bengal and Assam. It would seem to be the case that a very large section of the public believes that it is morally less creditable to be legally subject to constant accounting and cross-accounting, that all earnings should go into one pool, and that those who live longest should take all that is left by the joint efforts. If the interest is pledged to meet a temporary necessity, that indicates more the loyalty of the pledgor than the selfishness of the other coparceners who will not pay out of the common purse for the individual's separate requirements.

357. The powers of the manager could be better defined, so that any act for the reasonable benefit of the family is binding on it. Minors ought not to be able to question the alienations of their fathers at all, though uncles, of course, are in a different position.

358. The Pious Obligation, which performs its modern task very inadequately, and gives rise to so much unsavoury litigation, might well be abandoned, without great harm to anyone.

359. Finally, it should not be a matter of difficulty for the rules as to acquisition of joint family property to be codified in a satisfactory manner.

(4) *The matrilineal joint family.*

360. It must be borne in mind that in Malabar in particular the law of the matrilineal joint family has

undergone considerable modification by statute. Much of its wealth has been taken away from it. Partitions are allowed. The manager's position has been regularised. But the alterations are not the same in Madras State, Cochin or Travancore, or for each matrilineal caste in each State.

(*i*) *Before statutory modification.*

361. The joint family as a whole was (and is) known as a *tarwad*, while the descendants of a female through the female line only formed (and form) a *tavazhi*, which is a sub-*tarwad*. The property belonged to the *tarwad*, though that did not prevent property belonging to one *tavazhi* to the exclusion of others. The member was entitled to live on the *tarwad* properties, subject to the management of the *karnavan* (in S. Kanara called *yejamana*). On death all the self-acquired properties of the members went into the common *tarwad* fund. No member could partition from the *tarwad*, though effective partitions of *tavazhi* from *tavazhi* were known.

362. Managership was in the hands of the eldest female member, or, as was more usual, in the hands of the eldest male member. His propensity to use *tarwad* property for the benefit of his children and their mother or mothers, who would, of course, be members of other *tarwads*, led to the necessity of the Court's being authorised to remove him for misconduct and to control his alienations at the suit of any member of the *tarwad*, and to oblige him to account for his stewardship. The temptations being somewhat different in the matrilineal family, it is not surprising that the position of the manager differs from that obtaining in the patrilineal families.

(*ii*) *Under the present law, and the "Hindu Code Bill".*

363. The members of the *tarwad* except in the case o Ezhavas have been given the right to separate from it

and to take their *per capita* share. But this right has been given subject to several conditions which vary from statute to statute. Generally the death of the eldest female ascendant gives her issue the right to separate: or her consent; or her being beyond the age of bearing further children. The consent of every member of a *tavazhi* remains a ground upon which the properties may be partitioned. Shares are determined by heads and no question of representation arises. The property taken at a *tarwad* or *tavazhi* partition is the separate property of the individual that took it until, if a female, a child is born to her, in which case the property is once again *tavazhi* property between the two of them, the mother being the manager.[21] Property given by a man to his wife and her children is generally *tavazhi* property, and not held by them as tenants-in-common, though here the statutes have not made a regular picture and the contrary rule is in force in some cases. Spending of such property is of course hindered in the former situation.

364. On intestacy the separate property of a *Marumakkattayi* passes only in part to his *Marumakkattayam* heirs, and where these are only represented in the relevant statute by the mother presumably she takes the inheritance as her separate property permanently: but this is not quite certain after the recent Travancore-Cochin Full Bench decision. In any case the *tarwad's* sources of income are greatly diminished. But the *tarwad* as an institution is by no means moribund.

365. The position of the manager, his appointment, removal, liability to account, liability to be sued by the members, and so on, even his powers of giving mortgages and making sales that shall be binding upon the *tarwad*, are now largely regulated in some detail by the statutes.[22]

366. The desirability of still further reform is beyond question, but there is no agreement as to the speed with which reforms should be put into effect, or the direction which they should take. Testamentary disposition ; right of partition : right to marry and set up a legitimate family capable of inheriting upon intestacy : all these have been achieved, and a question remains whether the surviving matriliny and matrilineally-held property-scheme should continue. An "orthodox" view would be unsympathetic to a scheme which was once founded on sexual promiscuity, but conservative local opinion would expect the institution of the *tarwad* to continue to serve a useful purpose, even though sexual promiscuity may be more or less a thing of the past. The fact cannot be denied that the statutes provide only for the co-existence of the patrilineal, or bilineal family, alongside the matrilineal *tarwad*: they do not set up a patrilineal joint family. All the advantages of joint family life and property-holding, therefore, are reserved for the ancient *tarwad*, which thus, with all the modifications which the individual statutes have imposed upon it, continues to hold the field. The most sensible, and by far the most commonly-held, view is that the *tarwad* should be allowed to die a natural death, by repeated partitions where the members feel that course requisite for them, and when such partitions have become automatic in a vast majority of families, that will be the time for the local legislatures to abolish the right by birth in *tavazhi* and *tarwad* property.

367. The Ambedkar Committee wished to deal with the matter at one go. Out and out abolition was all that was offered to the families governed by Malabar laws. But the Fourth Draft contained a section (sec. 90 I) which exempted Marumakkattayam, Aliyasantana and also Nambudri laws from the joint family Part of the "Code".

The Succession Part of the "Code" did not make such exemptions, and the result would be bound to be anomalous and fruitful of difficulties. Moreover a useful opportunity for satisfying the one unquestionable ground for reform was neglected: the dozen or so statutes differing from one another as they do, the later ones revealing considerable advances juristically over the earlier ones, it is very necessary to have a single Malabar law which will cover Aliyasantana and the various sub-divisions of *Marumakkattayam*.

368. No doubt it would be best if Malabar laws were left alone in the "Hindu Code Bill" and dealt with in concert by Madras State and Travancore-Cochin. The Hindu Marriage Act, 1955, of course supersedes *pro tanto* (except for *divorce*) the Malabar statutes, but Parliament are probably right in supposing that no very serious or untoward effects will be felt in Malabar on account of this wholesale repeal.

3. *The changes proposed in patrilineal joint family law in the Fourth Draft.*

369. All three parts of the "Hindu Code Bill" to be introduced so far into Parliament have made it clear that the Mitakshara joint family is not to be abolished, and this is indeed good news. The Pious Obligation is to go, however, and few will mourn its passing. The whole concept of the coparcenary has been reviewed, but the results, as will be seen below, have not as yet been thoroughly digested. The Fourth Draft, in making provision for a birth-right in the case of those who formerly followed the Mitakshara, was, as has already been stated, hastily composed and never submitted to a searching scrutiny.

(*i*) *The tenure of coparceners.*

370. Those to whom the Mitakshara law would have applied if the "Code" had not been passed are subject to Sections 90 to 90H. This leaves it uncertain whether persons now subject to Punjab customary law will or will not be caught by the general abolition of the birth-right, which is the starting-point of the Part. Those subject to that customary law are not *entirely* bereft of their personal law, which is Mitakshara law, since that applies to them where the recorded customs are silent.

371. Membership of the coparcenary has been remodelled so as to include certain widows. An attempt has been made to avoid the anomalies now experienced in regard to the Hindu Women's Rights to Property Act, 1937. This attempt has not been entirely successful, as we shall see.

372. The joint family property has been renamed "ancestral property", and has been defined as property of a father, father's father or father's father's father acquired by inheritance, any share in such property acquired by partition and any accretions to such property. Gains of learning as defined in the Gains of Learning Act, 1930, are excluded, also property acquired otherwise than by inheritance, or by inheritance from others than those stated, or any other property. The *Explanation* clears up all our doubts about the nature of accretions in a sensible and logical manner. But it will be noticed that no provisions are made for property to be merged with joint family property ("ancestral" property) or thrown into hotch-pot (*sharing* alone will not enable property to become "ancestral" property—this is stated in so many words); property "inherited" can etymologically include property taken by bequest, yet the Supreme Court has decided that property

bequeathed by a male lineal ancestor to his descendant without indication as to the tenure intended must be taken as separate property:[23] lastly the definition refers to property acquired by a *male* Hindu only. For the significance of this one must turn to the details about coparceners and their rights.

373. One becomes a *coparcener* either by inheriting, as above, or by being a lineal male descendant within four degrees of one who so inherited or became a coparcener in the same way by birth. This definition does not cope with the situation common in practice, where property was acquired by inheritance from his father by A., but A.'s son's son's son's son has no birth-right in it; on A.'s death however the birth-right of that son attaches to all the property in the hands of A.'s son, and in this way the chain is continued. The Draft says a coparcener may be one who is not *for the time being* (an odd phrase, since relationships are permanent, excepting the effects of an adoption) more than four degrees from any of the descendants of any person who has so inherited and who is the oldest living paternal ancestor of that person in the male line. This does not entirely cope with the difficulty. The degrees are, as at present, counted inclusively (not as in the Succession Bill). There are, apparently, to be no "disqualified" coparceners, even lunatics, and for the murderer's position see above and below (secs. 354 & 506).

374. Partition is authorised in Sec. 90E and Sec. 90B (3). Neither section tells us how a partition is to take effect. Not only is no emphasis laid, as at present, upon the distinction between severance of status (as coparcener) and partition by metes and bounds (partitioning the property); but nothing is said as to how we are to tell when a coparcener has ceased to be one. We must refer once

more to Section 4 of the "Code", and hold that the present law applies. The current law about presumptions regarding the jointness of other coparceners is retained unaltered. Nothing is said about the father's right to separate his sons from himself or his minor sons with himself, and we must presume these to be abolished by implication. No great harm will be done thereby, it seems. The Bombay rule restraining partitions, and the Punjab rule to a similar effect (if this Part applies to those subject to Punjab customary law) are abolished likewise by implication.

375. As to allotments of shares on a partition discrimination between *aurasas* on grounds of caste, or between *aurasa* and *dattaka* sons of the same man, are ignored and impliedly abolished. The special privilege of the Shudra's *dasiputra* is similarly abolished. The detailed rules concerning the shares normally available are so phrased as to give rise to ambiguities and difficulties, and the Bombay-Madras and Mysore controversy referred to above (sec. 347) is not clearly resolved.

376. When the coparcenary terminates by reason of the death or giving in adoption of all coparceners except one, it is distinctly stated that the "ancestral" property is held absolutely by the holder. This is natural, since divesting by reason of adoptions is to be abolished except for specific exceptions (secs. 310, 311 above); a posthumous son is counted as one born for these purposes: the rule about the son conceived after partition is impliedly abolished, and the tenure of the last coparcener will be subject to the rules in the Maintenance Part of the "Code".

377. Reunion is not provided for, and the current law on that subject, towards which the Courts have evinced a consistent repugnance, is to be abolished by implication.

378. Incidents of coparcenary property are given as follows. Every coparcener is to have an interest equal to that of his father: the significance of this is not evident except at a partition. All the *members of the coparcenary* are to hold the property as joint tenants, which means that each one will own the whole as at present. The interest on death will pass by survivorship to the surviving members of the coparcenary. But if a coparcener dies his widow (even if unchaste,[24] it would seem) will take an interest equal to that of a son in the property, and an unmarried daughter will take an interest equal to one-half of a son, and a married daughter one-quarter.

379. There may therefore be coparceners and females who have acquired an interest. The distinction is not very clear. The provision regarding the sole-surviving coparcener does not apply to the female, but we cannot see why this should be. It is clear that females will not, as at present, take shares at a partition between their sons or grandsons. Nor is it stated that on remarriage a widow will, as at present, forfeit her interest. It is said that on her death undivided her interest will revert to the members of the coparcener. This would appear to mean the surviving coparceners, which of course excludes females who have taken an interest. Daughters *may* in fact be coparceners, and not excluded, for they are, after all "born in the family of the person who has inherited any such property and is a lineal descendant of such person in the male line". Yet their position is equivocal, since Sec. 90B (4) tells us that the word "coparcenary" itself means a body of two or more *males*. A closer scrutiny of the sections is not really necessary since a superficial examination shows that they are not adequate and must be entirely reviewed before promulgation. The Draft was a hasty affair, and cannot be expected to show signs of perfection.

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(*ii*) *The position and powers of the manager.*

380. Since a great deal of our current difficulties are bound up with the concept of the manager, we may not be surprised to learn that the Fourth Draft attempts to abolish him. The wording of section 90D, preventing alienations except of one's own undivided interest, makes it clear that there is to be no managership *by law*, as distinction from agreement between the coparceners, etc. This is a radical step, and one which is likely to lead to untoward results. It is curious that in the Hindu Minority and Guardianship Bill (sec. 12) the possibility of the minor's undivided interest in the joint family property's being under the management of an adult member of the family is accepted. It may be argued that this refers to a contractual managership: but who may contract the minor into such managership? If such a right exists then this also should be set out in the Minority and Guardianship Bill, or provisions should be made there for the Court to have appropriate powers in this connection.

381. Authorisation for the manager to act will have to be given to a coparcener, or female who has inherited an interest, or, possibly, a stranger, by each and every person owning an interest, or on behalf of those not competent to give such authorisation personally. This will have to be either general or particular. The drawing up of the necessary forms of agreement should not be a difficult task and additional work for *muffasil* pleaders will thereby be provided. But until such agreements come into universal use the mere abolition of the manager will create endless disputes, and a great deal of hardship in practice. Commerce will suffer worst, since hardly anyone will be willing to deal with a *de facto* manager until the Courts have reinstated his power parallel with the dis-

enabling section of the "Code"! The result, though fantastic, may be workable, and will be paralleled by the situation in Guardianship law (see sec. 215 above).

382. Of course our present presumption of managership right is to be abolished, if this Draft stands, and the Courts will be hard put to it to establish, in a conflict of claims to have the right *de facto* (since there is to be no *de jure* manager), who in fact had the prior justification for making the alienation or otherwise dealing with "ancestral" property.[25] There is no reason to suppose that the eldest male must necessarily be the one.

(iii) Alienations by owners of "ancestral" property generally.

383. The Fourth Draft adheres to the opinion set forth above (sec. 356) that alienations of undivided interests are a good thing in general. This power is to be extended all over India. But nothing whatever is said about alienations for value, whether they bind the interest proportionately with the share at the time of alienation, or subsequently. The uncertainty about the status of the females' interests adds to the doubt in this instance also. Again, since no objection is voiced in the "Code", gratuitous alienations of an undivided interest without the consent of the other owners of interests would appear to be valid. This is a complete departure, though not entirely illogical, seeing how far we have come (in South India at any rate) from the pure Mitakshara concept of the joint family.[26] Testamentary disposition of a coparcenary interest is to be controlled by the *current* law—this is set out in the Hindu Succession Bill. And this means that by agreement or constructive agreement (as where the legatee is the other coparcener) or by way of family

arrangement acted upon by the complaining party, a coparcenary interest may be bequeathed.[27]

384. In passing it is proper to add that as no mention whatever is made of the Dayabhaga joint family, we are to conclude in that instance that shares are alienable just like separate property, and that all rights of management, etc., will have to be derived from the general law, which will be that of agency, etc.

(*iv*) *Realisation of coparceners' debts by third parties.*

385. The Pious Obligation having been abolished, creditors may have access only to the debtor's interest. The Fourth Draft says, "no court shall, in execution of any decree passed against any such member or female, proceed against any ancestral property otherwise than against the interest in the property belonging to such coparcener or female, as the case may be." This is to be our authority for the proposition that, notwithstanding the death of the coparcener or female, the interest, if attached in due time, can be made liable for satisfaction of debts! But nothing is said as to what proportion of the property will be so available. Is it the proportion relating to the time of attachment, or at the time of the decree or at the time of the sale? The present position, which seems equitable, ought to be set out in so many words. Then the question of vesting in the Official Assignee or Official Receiver upon an insolvency adjudication, which is a similar matter, ought to be dealt with. The whole question is left at large by the patent ambiguity between the wording of sec. 90D, when read in the light of the fullness of the present Hindu law, and the wording of the all-important Sec. 4 of the "Code". If the High Courts were all of one accord on the questions of attachment and execution, and

the rights of an alienee to sue for partition and the manner in which he should do so, these rules *might* be held conveniently left by Parliament for the court to make out from current practice. But in the present uncertainties that can hardly be the intention of the central legislature.

386. It remains to enquire whether it is really just that the coparcener under the joint family Part of the "Code" should be liable to lose his interest at the suit of his private creditor, while the same is not the case with owners of interests in *tarwad* properties, which are exempt from attachment. Is this discrimination consistent with constitutionally protected Fundamental Rights?

4. *The result.*

387. The sections of the Fourth Draft are as yet too little considered to be seriously accepted as a proposal, except in general outline. This general outline, its limitations being taken into account, greatly relieves the technical and practical objections taken at present to the law of the joint family.

388. There are, however, a great many questionable points, although not all of them can conveniently be dealt with here. Amongst them we have already mentioned the abolition of the manager, which cannot, in the long run, serve a useful turn. Giving a share in "ancestral" property to married daughters, who have been advanced at the time of their marriage, would seem to be a mistake, and the proportions given to daughters, together with the combined effect of joint family law and succession law, are matters which will have to be reviewed in due course. A number of concrete suggestions might be made, which may be utilised while these further reviews and discussions are going on.

5. *Suggestions which may relieve undue rigidity and make the Draft of joint family law more satisfactory.*

389. (*i*) Those subject at present to Mitakshara law should be entitled by registered deed to leave it and become subject, them and their descendants for ever, to the general Hindu law.[28]

(*ii*) Separation by virtue of marriage under the Special Marriage Act, 1954, should be abolished.

(*iii*) Managers should be compulsory for every coparcenary, the manager to be chosen by the coparceners where there are more than one adult coparcener. In default of evidence of choice, the eldest undisqualified male to be presumed conclusively to be the manager.

(*iv*) Manager's powers to be set out in the statute.

(*v*) Women as well as men to be equally coparceners.

(*vi*) Daughters to be entitled only to maintenance (including dowry and marriage expenses) out of joint family property.

(*vii*) Both in Mitakshara and Malabar law the interest to pass at death *subject to debts* (to do away with attachment worries and to iron out anomalies).

(*viii*) Manager not to be liable to account, except for peculation.

(*ix*) Father's alienations to bind his minor sons in any event.

(*x*) No after-conceived coparcener to be entitled to question an alienation.

390. If the above suggestions are fully considered it is possible that, when those amongst them which are found acceptable are added to the sound provisions in the Fourth Draft, the result will obviate all opposition to the retention in principle of the Mitakshara birth-right.

391. In conclusion it might be considered useful for Parliament to deprive the State Legislatures of power to legislate otherwise than in full concert and agreement in respect of the peculiar Malabar laws. There appears to be no reason, on principle, why the disunity in that regard should be perpetuated.

CHAPTER VIII

MAINTENANCE

1. *Rules of maintenance peculiar to systems having the joint family.*

392. A stranger opening a book on Hindu law and finding the large number of people who are entitled to be maintained, and seeing the conventional division between those who have rights of maintenance against the person, rights against property, rights which are morally binding and not legally enforceable until the death of the person against whom they are directed, and so forth, might well wonder not only why the rules are so complex when compared with those in most European systems, but also whether after all the Hindu law has not anticipated the Welfare State. The truth in fact is that our present maintenance law derives entirely (or almost exclusively—for it has been spoiled by incompetent handling in some details) from the era when there were no families in India except Joint Families, and when the greatest duty lying upon a male after his duty of self-preservation was the maintenance of his kith and kin. So powerful are these sentiments even to-day that the most ardent "reformer" will not dare to tamper with rights of maintenance. Hence the "Hindu Code Bill" retains the complexity and luxuriance of the current law with only a few major alterations. Indeed it is quite possible that the road to advance is towards increasing the scope of the maintenance-right.

2. *Maintenance under the shastra.*

393. While the *shastra* recommended the maintenance of a number of close relations at one's own incon-

venience, and a still greater number if one were well-off, it insisted upon the maintenance in any event of only three classes of people: the aged parents, the virtuous wife, and the minor son. In fact the *shastra* regarded the family as a whole liable for the maintenance of concubines, *dasis* and *avaruddha-stris,* their issue of either sex, and certain other relations, such as indigent widowed daughters, but the texts do not make this perfectly clear, the fact being observable from inferences.. It will be noted that the obligation did not extend to grandparents nor to the impenitent unchaste wife nor to daughters, though we can be sure that daughters had a right of maintenance against their fathers and certainly against their mothers, while we know that the *shastra* eventually adopted the view that even an unchaste wife must be maintained so long as she desired to be maintained. In the classical as in the modern law the fact of the wife's or widow's willingness to reside with the person who is under an obligation to maintain her is often taken into account, since it is obviously much cheaper to maintain someone under one's own roof and out of one's own cooking-pots.

394. Coparceners, of course, had maintenance as one of the rights of coparcenership. But this was a right against the coparcenary property as a whole, and was distinct from the right as a minor son, for example: the latter lasted until majority and not further, the former as long as the claimant lived unseparated. Disqualified coparceners and disqualified heirs had rights of maintenance against the property in question—all those who might not take a share could be maintained, except the outcaste and his son, who were denied the right. The outcaste's daughter was maintained, however.

3. *Maintenance under the present law.*

395. No major change is to be observed except that the illegitimate daughter, even by a permanent concubine, is not allowed maintenance. Illegitimate sons by permanent concubines (*dasiputras*) even of Shudras are not allowed maintenance, except by custom, out of their father's impartible estate.

396. The minor legitimate daughter is entitled to be maintained by her father. Her claim against her mother does not seem to have been vindicated in the courts.

397. The widowed daughter and the widowed daughter-in-law are morally entitled to be maintained, and whether they are so or not they may claim maintenance out of the property of the person in question when he is dead. In Bombay the father-in-law can defeat his daughter-in-law's rights by will: in Calcutta and (apparently) Madras he cannot. Saurashtra and Madras are not agreed as to whether her rights extend beyond the joint family property—Madras holds that they do. The widowed daughter-in-law cannot insist upon separate residence and maintenance, and the widowed daughter is expected to obtain her maintenance first from the family of her deceased husband.

398. Parents, minor children and the wife, even if unchaste, may enforce their claims against a man and any part of his property may be attached to satisfy them.

399. The Courts are not in agreement as to the rights of the unchaste wife: it has been held both that allotments of property to her for her maintenance are forfeited for unchastity, and that they are not so forfeited.[1]

400. A woman, even one formerly married to another, who at a man's death was loyal to him as a concubine, though she might never have seen his legiti-

mate family, is entitled to be maintained out of his separate property and even his interest in joint family property so long as she remains chaste. Even a woman who is married to another man at the time of her lover's death has been held to be so entitled to maintenance as a *dasi*.[2] This is a great, and almost unwarranted, extension of the *shastric* notion.

401. Arrears of maintenance can be claimed up to the period of limitation (three years), and in one instance at least it has been possible for a widowed daughter-in-law whose father-in-law refused to maintain her (he was not legally bound to do so),[3] to extract several years' arrears of maintenance out of the deceased's estate in the hands of his son upon the ground that the son was bound to make the moral debt good under the Pious Obligation[4]! The abolition of the Pious Obligation (see sec. 369 above) will put a stop to this anomaly. Bombay and Madras cannot agree as to whether the Court has a discretion to reduce a lump sum claim for arrears of maintenance, in the absence of waiver or other grounds which would make its award inequitable. Saurashtra, as might have been expected, sides with Bombay against Madras, holding that the discretion continues.[5]

402. There is a difference of opinion as to the rights of widows where shares were allotted to them at partitions and also where they take an interest under the Hindu Women's Rights to Property Act, 1937. The consensus of opinion is contrary to the *shastric* attitude, which is that the duty is an absolute one, in holding that once provision has been made for maintenance the claim ceases. It is agreed that the amount of *stridhana* she possesses is always irrelevant in deciding *entitlement* to maintenance. It has been held that the income of her husband's interest was the limit of her enforcible claim.

403. It was once thought that the illegitimate son was not entitled to maintenance at the same rate as his legitimate half-brothers. This view may be regarded as probably, though not certainly, exploded.

404. Rates of maintenance, which can be reviewed upon application to the court, are fixed with reference to the following considerations:—

1. The income of the defendant or the size of the estate.
2. The total number of applicants and the dependants in general.
3. The status of the applicant and that of the persons liable to maintain her or him.
4. The standard of living of the parties, but not, it seems, the other sources of income of the applicant, if any.
5. The relationship between the claimant of the person liable or the person whose estate is liable.
6. The conduct of the claimant towards the person liable or the person whose estate is liable.

405. Widows used to be thought entitled to a pittance because of the notion current at one time in Hindu society that the widow's duty was to spend the rest of her life in penury, obscurity and prayer. This view is no longer accepted for practical purposes, though, as elsewhere in the world, the Hindu widow cannot expect to be supported to the same extent of affluence out of a capitalised estate as out of a current income. The only exception is where the husband is supposed to live on in the widow and she takes his coparcenary interest under the Hindu Women's Rights to Property Act, when, of course, she can consider herself the virtual owner of the income of that interest, which she may realise if she chooses.

406. Maintenance, being a personal right, cannot be transferred or mortgaged. Future maintenance is a thing *extra commercium.*

407. Maintenance rights cannot be prejudiced by donation or testamentary disposition. If a maintainee fears that the right is in danger, the court on application may create a charge on the property in favour of the applicant. Even without a charge the heir or purchaser may have to maintain the persons entitled to maintenance out of the property. The only exceptions occur when the owner is indebted, when, under the law as it is at present, in the absence of a charge, all debts take priority over the maintenance claims: debts for family purposes will save alienees, who have bought property from a manager anxious to pay those debts, from any difficulty which maintainees might cause : and otherwise no purchaser can be quite sure that someone may not suddenly arrive with a maintenance-right of which the unfortunate purchaser ought to have had no notice at the time of the transaction.

4. *As proposed under the Maintenance Part of the "Hindu Code Bill" and the Hindu Succession Bill.*

408. In the first place, the basic principles are not altered. The rule that testamentary disposition cannot prejudice persons entitled to be maintained is continued, and this keeps the Hindu law in line with the most up-to-date systems in the world, including Family Protection laws as known in New Zealand, Australia, Canada and England, and also the (projected) Succession Law of Israel. It is certainly an advantage that the prospects of persons whose relationship to a person is simply that he is bound to keep them should not depend upon the accident of his surviving them.

409. Maintenance is defined as including provision

for food, clothing, residence, education and medical attendance and treatment, and in the case of an unmarried daughter the reasonable expenses of and incident to her marriage. This is not new. There is no point in fixing the amount which the unmarried daughter can insist upon as a dowry. The statutes which do this[6] are probably not justified in the face of the general social demand for the abolition of the dowry-system itself.

410. The wife even if separated[7] is entitled to maintenance by her husband, or after his death by his father. It is not stated whether she may still claim this if she has inherited her husband's interest in the coparcenary property. It would seem unfair to give her *both* rights simultaneously. She can claim to be maintained separately from her husband upon one or more of grounds listed (for which see above, sec. 151).

411. The widowed daughter-in-law must first seek maintenance from her own property, then from her husband's estate, then from her son's estate, and finally, failing all these, from her father-in-law's estate. This is a novel manner of setting out her position, but it ignores her rights in her husband's coparcenary property.

412. Legitimate or illegitimate children (of either sex) must be maintained by their father. In case of illegitimate children presumably proof of paternity will have to be supplied, which will, I think, be a novelty in Indian practice, except under the criminal law. The maintenance will not extend beyond majority, or in the case of an unmarried daughter her marriage or her ceasing to live with her father. No question seems to arise of a daughter obtaining separate residence and maintenance, no matter how appalling her father may be to live with. Her right to take an interest in coparcenary property is not mentioned in this connection, nor an alternative life-long right against

the coparcenary property as a whole, if she choose not to marry or is incapable of being married.

413. The aged mother must be maintained by her son, but the aged father must be infirm as well as aged. This is also new. It is a novel, but sensible rule that the mother must support their children, whether legitimate or illegitimate, if her husband is unable to do so. The Section which proposes this has two odd provisions (sec. 129 of the Fourth Draft): if she has not the necessary means to maintain them the court cannot force her to maintain them—idleness will safeguard her, or illusory or perhaps collusive poverty. And then her duty begins when her husband ceases to be able to maintain them: why should her husband be bound to maintain her illegitimate children? For the section seems indirectly to place this obligation upon him!

414. To these arrangements the Fourth Draft adds a scheme of rights against a deceased person's estate. A class of *dependants* is set up (as under the English Family Protection statutes), consisting of the parents, widow (until remarriage), minor son, son of a predeceased son and son of a predeceased son of a predeceased son, in the last two cases where the father's estate does not provide sufficient for his maintenance, unmarried daughter (while unmarried), married daughter (if unable to obtain maintenance from her husband's or her son's property), widowed daughter (if unable to obtain maintenance from her husband's estate, or son or his estate, father-in-law of his father or the estate of either of them), any widow of a son of a son of a predeceased son (until remarriage) provided she cannot obtain, etc., minor illegitimate son, unmarried illegitimate daughter. These may claim from the heirs if they have not received *any share* by will from the deceased's estate or only a share smaller than would have

been awarded as maintenance under the statute. Those heirs who are themselves dependants are not to contribute to the maintenance of others if the result would be that their share would be less than the capitalised value of the maintenance which they could successfully have claimed.

415. The amount of maintenance is to be calculated by reference to conditions closely conforming to those now in use. The unmarried daughter's marriage expenses however are to be within a maximum of half her intestate share. This is somewhat at odds with the wider rule under the claims against the person (sec. 409 above). If the Fourth Draft were literally followed in this regard and in regard to her intestate portion, the result would be that in the unlikely event of a suit the daughter would take for her marriage expenses half of a half of a son's share, which happens to equal the old Mitakshara rule (nowhere followed to-day) that the unmarried daughter at a partition is entitled to a fourth of a son's share for her advancement. This might be much too rigid to-day.

416. Maintenance is not to be a charge upon property. The present inconvenient rule which makes many transfers of property except in order to pay binding debts subject to the rights of maintainees has at least this advantage that prompt action is not invariably demanded of the maintainee in order to protect her interests. From the present Draft it would appear that the heir or heirs are obliged to maintain these "dependants" out of the estate inherited from the deceased by the heir or heirs, and once that estate has been alienated it would appear that the obligation ceases. This can hardly be the intention of the framers of the provision. Attachments immediately after the death must be insisted upon by every claimant if this were to become law.

5. *The result.*

417. It is evident from the foregoing that the Succession, Joint Family and Maintenance Parts of the "Hindu Code Bill" ought to be reviewed and considered by Parliament in close association. Otherwise confusion and undue complexity, reduplication and patent (not to speak of latent) ambiguities will be unavoidable.

418. The general trend of the proposed law is to be traditional, but at the same time moral without being uncharitable. Illegitimate children are better provided for, and the life-long claim of the illegitimate *son* against *joint family property* (undeserved in modern times) is removed. We shall also say farewell to the *dasi*, who must be provided for, if at all, by testamentary disposition. This will be a welcome change.

419. It might be questioned whether the Common Law Family Protection method of securing the interests of "dependants" does not work better than the rules set out in the Fourth Draft: in that way in the event of a disposition by testament or the combined effects of testamentary and intestate distribution, or the mere intestate distribution which does not make reasonable provision for the maintenance of "dependants", narrowly defined, the law can be varied by the judge to the extent necessary best to effect the desired object.[8] The subject is somewhat technical and cannot be entered into fully here. Finally if grandparents and grandchildren were brought within the scope of maintenance it might be advantageous.

CHAPTER IX

SUCCESSION TO PROPERTY

1. *The peculiar difficulty of the subject.*

420. The topics which we have discussed hitherto have been relatively simple, in so far as they have dealt with practical problems in which both the motives of people and their needs are fairly clear and straightforward. If one asks, what should be the grounds for divorce, should collusion be a bar to obtaining a decree of divorce, should minority end at 18 or 21, should only children be given in adoption, ought one to be able to adopt girls, what ought to be the powers of a manager of joint family property, should sons be liable to pay all their father's debts, and ought grandparents to be under a legal liability to maintain their grandchildren: all these questions are capable of comparatively easy discussion and rapid solution. But if one enquires whether the widow should take a share with the children, or should have a right to maintenance, whether a man should have testamentary disposition over the whole of his property, or whether of two rival claimants to an intestate estate, the father's mother's son's daughter's son and the mother's father's daughter's son's son or daughter, each should share, one should exclude the other, or whether indeed either should share at all, we are at once conscious that before we can answer the question we must dive into very complex social, psychological and economic questions. Large conflicts of policy and desires must be resolved before a law of succession can be worked out, and indeed every existing law of succession is a valuable heritage, enshrining the hard-won experience of dozens of generations. Balance, compromise,

ethics and practical politics, all have made their contribution to a most delicate and vital organism.

421. The layman cannot without infinite labour work out a law of succession which would have much hope of success, since his personal prejudices and experience would serve merely to lay down a rule which might, perhaps, be equitable in respect of his own property, but would have no authority in regard to other people's. This is why ancient laws, laws having sacred associations, laws hallowed by centuries of adherence and invariable respect, will grasp the imagination of the public and claim their unwavering adherence; will be, in fact, practically self-justificatory: that which has such an authority behind it stands firmly just because it is not the figment of the brain of an individual. Yet because the laws of succession are universal—they apply to all people whatever, whereas marriage and adoption for example do not—they simply *must* be successful and well-adjusted to the public's needs. Wherever a maladjustment appears the public will automatically find ways of evading the law, and sooner or later the law itself will be amended in order to keep pace with contemporary needs. When once an amendment has been made the legislature will be very loath to make more than trifling alterations until a very long time has passed, because once the law of succession seems to be readily capable of alteration it loses its authority, and uncertainty is introduced just where everyone desires certainty above all things. This certainty is ardently desired by all who own property, since much of their conduct in this life is governed by considerations as to where the property they have earned or inherited is to go in the event of their death, and since everyone knows that he cannot foretell the hour of his death there is a universal need to be able to be sure that in the event of a succession coming about

unexpectedly the *right thing* will happen to that property. That property bore during the lifetime of the owner some metaphysical relationship to him, and he feels that he has some right over it even when he is dead. This feeling is by no means less common in India than elsewhere. It would be a practical as well as a logical fallacy, were it not for the fact that *rights* emanate from the social body and not from the person, and it is indubitably in the public interest that individuals should believe during their lifetimes that their prejudices and reasonable preferences should be, so far as is just, put into effect after they are dead. If people knew that on their death their goods would be partitioned amongst the first-comers, our economic life would be entirely different. That is not to say that it would not be in some respects happier, but it would not be consistent with the basic assumptions upon which civilized life flourishes in every part of the world. Thus although we know that everywhere it is the living who partition and distribute the effects of the dead, we accept as a theoretical rule that the law of succession must be certain and acceptable to generations together, not merely to every successive generation independently. Laws of succession are not to be altered radically except with grave reason and after due deliberation, and then only at very long intervals. The only civilized country which has tinkered with the law of succession frequently, Soviet Russia, has savoured the truth of the foregoing statement in the difficulties and contradictions which her system has been obliged to experience.

2. *The complex position in the dharmashastra.*

422. The *dharmashastra,* as it is to-day, is by no means as complicated a system as it was two thousand years ago. Then no less than a dozen sorts of succession-

law were *legally* sanctioned, and numbers more were actually in force by custom. Now custom indeed retains some of the rules which were once legal, but the *shastra* has eliminated in the process of time a good number of alternatives and possible interpretations of the *smriti* texts, so that the number of "schools" actually in vigour from the *shastric* viewpoint is much reduced. Yet the position is so complex that it is unrivalled in that respect anywhere in the world.

423. Succession must be divided into (a) succession to males and (b) succession to females; then it must be subdivided again. Succession to males may be divided into (aI) succession to males of the householder or student classes, the *brahmachari* or *grihastha ashramas,* and (aII) succession to *sannyasis* and others who have "entered another order" or *ashrama*, and have finally abandoned the material world. Division (aI) may be subdivided into further subdivisions: succession to males holding separate property (aIa) will be distinct to succession to the same persons holding joint family property (aIb), and both may be distinct from succession to a male holding property which is reunited property (aIc). Hindus who have married under the Special Marriage Act, or their descendants, are not governed by Hindu law in this regard at all, but by the Indian Succession Act, which is in some respects a poor copy of English law of about the period of 1925. Hindu law as to the whole of (a) division depends upon the major question whether a *shastric* "school" governs the matter, whether it governs it unamended, or amended by statute; or whether on the contrary the *shastra* is either partly or completely superseded by statutory provisions.

424. Succession to females (b) is subdivisible as follows:—married or unmarried females; married in an

approved form (Brahma or Gandharva) or married in an unapproved form (Asura); holding property derived from relations or strangers, given or earned, given at or before marriage, or given after marriage, proceeding from the blood relations or from relations by marriage, or, lastly, whether the property takes the place of an ancient bride-price. The "school" of law is of vital importance, since large differences exist—not always put into effect, however—and also the questions, as before, concerning the effect of statutes.

425. Property held by women, *stridhana,* does not include property *inherited by them.* To this there is an exception, namely property inherited by women in Bombay from women and from men who are related to them by blood. Apart from *stridhana* therefore a woman may hold property without being its complete owner and on her death a succession will open not to *her,* but to the person whose property it was before she inherited it. Thus succession can take place in two stages, with a limited estate to a female heir, the remainder over to the reversioner. The whole matter is somewhat complex to explain in legal terms and will be postponed for later treatment (secs. 471 & ff. below).

426. Why was the *dharmashastra* so complex, and why are its contemporary vestiges so elaborate? The subtle questions which the ancient sages and more recent commentators had to consider were no less complex than those which face the modern legislator. In the case of succession to a male his relationship to the possible beneficiaries, the extent to which they depended upon him, and his function while alive, all these factors were taken into consideration, and an over-simple law of succession would ignore factors which were essential to the matter. In the case of succession to females the problem cannot be under-

stood unless we accept that amongst the Aryans (though not the Dravidians) women were *prima facie* capable of enjoyment but not ownership. To this harsh rule exceptions were gradually admitted and the effects listed and rationalised. Exceptions were permitted on condition that the property in question passed to those whose expectation of succeeding was consistent with the circumstances most usually prevailing at the time of the gift or earning, as the case might be. In other words, the jurists allowed women to be owners, provided the wrong people did not come into the property in question after their death. This attitude presupposes a willingness to go into minute questions of circumstances, and hence the complexity of succession to *stridhana* upon which some of the best jurists in the *dharmashastra* have wrung their hands in despair.

3. *The considerations which influenced the shastrakaras.*

427. We have already noticed that the donors who gave property to women, and the husbands who allowed their wives to earn money for themselves were allowed or encouraged to do so by the knowledge that after the woman's death care would be taken to see that the balance remaining would not pass into the *wrong* hands. It was thought, for example, that property given by strangers should go to the husband, and should not be alienable by the wife during her husband's lifetime without his consent, unless the stranger's gift was made upon a ceremonial occasion suited to the purpose, such as the marriage. There was a moral element in the matter. Strangers in the ordinary way have no business to be making gifts to married women. A father who gave jewels to his daughter before marriage did not want these jewels to fall into her

husband's hands or, still worse, her husband's father's or brothers' hands if the girl unfortunately died without any children. The main motive of giving large presents at the time of marriage was to secure the daughter and her daughters from difficulty in the husband's joint family, for the birth of many daughters would be an uncompensated loss to that family, which would have the burden of providing them with husbands. Hence daughters, according to the *smritis*, but not all later commentators, had a preferential position in succession to unexpended *stridhana.* The element of need was uppermost and the commentators make this quite clear. When daughters compete for *stridhana* those who are married are excluded by those who are not, and amongst married daughters the impecunious ones exclude those who are comfortably or fairly comfortably off.[1] An old *shastric* interpretation said that those who had sons might be excluded by those who had not, since the mother of sons would never fear destitution. Another school took the opposite line, under the influence of the "spiritual benefit theory" (see sec. 430 below), and made daughters who had sons or might yet have sons preferential heirs over other daughters.[2]

428. While need and relative merit were very clearly chief motives behind the choice of heirs in the *shastra,* the story is only begun. In the joint family according to the Mitakshara pattern (secs. 345 & ff. above) the joint collaterals, etc., depended for a great many conveniences upon the joint property. Much, if not most of it, was derived from the accumulations of ancestors. If a coparcener separated and took his share, then as a separated member of the family he was entitled to ignore the moral claims of the others, just as they had no longer any legal claim to take from him by survivorship. But as long as he remained joint they might reasonably expect that they

would own his interest as well as their own when he died. His dependants were content to depend upon him while he drew an income from the joint family property ; they would be content to continue to do the same when he died.

429. But where a man died separated and unreunited the question of who should take the property became highly controversial. The *Smriti* texts conflicted about the widow. One thing was certain, that if she were unchaste she did not succeed, and probably subsequent unchastity divested her, as it still does in the Punjab customary laws. But some denied that she had any right of succession, while others, who eventually won the day, contended that so long as the estate she took was held upon a limited estate there was no harm in her taking, since after her death (or surrender of it) it would pass to the heirs of her husband, and the property would not go "out of the family". As long as the Aryan concept of the woman going into her husband's family predominated this attitude was bound to be well represented. Yet between those two rather extreme view-points there were several intermediate positions, none of which are now of any other than historical importance.

430. After the widow and the daughter and the daughter's son, who was let into the scheme because he could be thought of as a substitute son, the question who should take the property next was solved by reference to the principle of proximity, or relative propinquity. *Pratyasatti* or *samnikrishthata* was the term the *shastris* used for it. In Mitakshara law that alone was used, with somewhat arbitrary rules of succession according to categories, as the guide. As long as a relation by blood could be found whose relationship had any reality in law, that relation was entitled to inherit, the nearer excluding the

more remote. But the simple rule of nearness was not permitted to settle the whole matter because of the conflict between such a simple principle and the rather brief and dogmatic texts of the *smritis*, the only technical interpretation of which was bound to classify heirs in a somewhat artificial pattern. The Bengal school, which follows Jimutavahana, adopted a new and intelligible idea, much appreciated even by later writers in the Mitakshara school, to the effect that in defining nearness in a particular way it is possible both to keep a consistent policy of applying that criterion and also satisfy the ancient classificatory texts. The "spiritual benefit theory" was, briefly, the notion that the inheritance was at once the means of and the reward for paying periodical tributes to the deceased, either directly or indirectly, in the *parvana-shraddha* ceremonies, which commemorate paternal and (some say optionally) also maternal ancestors. The theories that the female shares the spiritual benefit of her spouse, and that *pindas* are worth more than *pinda-lepa*, the whole cakes more than the wipings after they have been made and offered, and that *pindas* offered to paternal ancestors are worth more than *pindas* offered to maternal ancestors of the *propositus*, and that *pindas* offered by a male are worth more than those offered by a female—all these theories having been accepted it was possible by a somewhat elaborate method for the Bengali jurists to work out a consistent scheme of succession-laws, particularly in connection with succession to males, which had as its mainspring the common-sensical notion that the property should go to the person to whom the deceased if he were capable of it would be likely to be most grateful, and who would best be able to demonstrate in practical shape his own gratitude to his ancestor, from whom the property came.

4. *The considerations which apply to-day.*

431. The position is much altered to-day. The "spiritual benefit theory" still claims many adherents, yet in practice it is wholly illusory, since the performance of the ceremonies is not exacted from the heir, the nearest person entitled to offer the *pinda* does not always get the inheritance, and other discrepancies, too important to ignore, were detected when Sarvadhikari examined the whole matter in his celebrated Tagore Law Lectures.

432. Nearness still remains, and merit also, and these are by no means useless considerations. Yet nearness itself, if we examine it closely, is nothing other than a form of merit. A low form, indeed, for if one has no other merit than nearness one must have very small moral claims! But within nearness there is enwrapped, as it were, the assumption that the nearer person has either actually depended upon the property, or has mentally anticipated enjoying it more fully on the death of the owner. Thus reasonable expectations are not alien to the idea of nearness.

433. But, the world over, the essential factors which must be considered in shaping a succession-law are need and merit, and it is the balance between the two in the most usual and normal cases which actually frames the law. For the law is something imagined by the legislature, or by society in pre-legislation eras, as the solution to the question, what would an ideally just and omniscient person do with the estate of such a man, placed in exactly those circumstances? The ideally just person, hypothetical as he no doubt is, is the real arbiter of the succession-law, and it is to him in imagination that the legislators turn. Need and merit are the twin standards by which every claimant's

claim must be judged by that ideal arbiter, and it is possible that the current Hindu law of succession, apart from its other defects, fails to give the property to those whose needs and merits most entitle them to it in the opinion of an ideal Hindu, who is equipped hypothetically for this task with the requisite qualities. There is ample evidence that changes are required, not merely in the pursuit of unity of the personal law. But this will become evident when we examine the present situation.

5. *The present law of succession to males.*

434. Succession to a Mitakshara coparcener is by survivorship, the interest being taken by the survivor or survivors, as in a joint tenancy. In a reunited coparcenary the law is by no means equally certain, but the general principle is that, as long, at any rate, as the reunited members are either of the whole blood, or do not include one of the half blood and exclude one of the whole blood, the rule of survivorship operates similarly to the position in an unseparated coparcenary. The law is by no means settled, but, since the matter is of very little practical importance, it is not worthy of further space here. At Dayabhaga law it does not matter whether the *propositus*, as the person is called whose property is in question, died separate or joint, since the law of succession has not been bifurcated in that "school". In what follows it is assumed that the estate, in the case of one governed by Mitakshara law, is of a man who died separate and unreunited, with this warning that in modern times a man who dies joint, but leaves separate property, is judicially presumed to die joint as regards his coparcenary interest but separated as regards his separately-acquired property.

(*i*) *At Mitakshara law.*

1. *According to the Allahabad High Court.*

435. I have taken the Allahabad High Court as the representative of the North of India, and as applying Hindu law in a form which perhaps most nearly conforms to the sources. The Benares "school" of Hindu law, as applied here, gives the estate to *sapindas*, that is to say *sagotra sapindas* together with a few special close relations not strictly so called, then to *samanodakas*, the relations related to the *propositus* within fourteen degrees in the male line exclusively, the number of degrees being counted not, as in the West, from the claimant up to the common ancestor and down to the *propositus*, but merely up to the common ancestor counting inclusively, the number fourteen not being exceeded on either arm of the family tree. After the *samanodakas* come the *bandhus*. These are cognates related to the *propositus* within the degrees of sapindaship, which are not perfectly settled for this purpose. The final view apparently is that the claimant may not be more than five degrees removed from the common ancestor who may not be more than five degrees removed from the *propositus* while an arguable case has been made out for the proposition that if either the *propositus* or the claimant is related to the common ancestor entirely through males the number of degrees can be extended to seven. After the last *bandhu* the *spiritual* teacher or pupil or fellow-student may take and in the absence of one so qualified, the State takes by escheat (or as *bona vacantia*—the position is not clear).

436. The order of heirs up to the brother's son's son is as follows:—

1. son, son's son and son's son's son, as joint heirs; widow; predeceased son's widow; predeceased son's pre-

deceased son's widow; 2. daughter; 3. daughter's son; 4. mother; 5. father; 6. full-brother; 7. consanguine half-brother; 8. full-brother's son; 9. consanguine half-brother's son; 10. full-brother's son's son; 11 (?) consanguine half-brother's son's son.

From here onwards the remaining *sagotra sapindas* take, but before these are described certain notes ought to be recorded about the first 11 heirs. The position of the widow and the widows of predeceased sons etc. above is due to the Hindu Women's Rights to Property Act, 1937. Apart from that Act, or where it does not apply, or in respect of property (such as an interest in agricultural land in West Bengal and certain other States) to which the Act does not apply, the widow succeeds only in the absence of male issue. Daughters do not take all together, but unmarried daughters first, and then amongst married daughters those who are in poverty exclude the rest. Amongst sons themselves those who are separated from their father are excluded, according to the view of the majority of the High Courts, by those who remain joint. This is a misunderstanding of the Mitakshara text. Separated grandsons are not excluded. Nor is any distinction made between brothers on the ground of jointness or otherwise—a matter which is relevant only in regard to the reunited coparcenary.[3] Uterine brothers, who are not uncommon, since widow remarriage takes place more frequently every decade that passes, are not at all provided for by the law.

Sagotra sapindas extend to seven degrees and are strictly agnatic, *i.e.*, related through males only. These do not take entirely according to propinquity, but by analogy with the sons and brothers, the search for an heir goes upwards to the next ancestor, *i.e.*, the father's father, and then, after some statutory heirs, down to father's brothers

and on to father's brothers' son's sons. In the same way it continues to ascend one degree and descend again four degrees (counting inclusively) until the father's father's father's son's son's son is reached and then the three lower descendants in the male line of the *propositus*, his father and so on in ascending line are taken until at last the father's father's father's father's father's father's son's son's son's son's son's son is reached. He is the last *sagotra sapinda*.

437. The statutory heirs are those inserted by the Hindu Law of Inheritance (Amendment) Act, 1929, which advanced the son's daughter, daughter's daughter, sister and sister's son to a place immediately after the father's father.

438. *Samanodakas* have been mentioned. These very rarely take. As for *bandhus*, otherwise known as *bhinna-gotra-sapindas* (secs. 444, 445), they are very commonly claimants, and it is most unfortunate that a hopeless controversy rages about their heritable rights. The very conservative Allahabad views are:

1. No female *bandhus* may inherit ;

2. No *bandhu* may be connected with the *propositus* by more than two females, and these must be related as mother and daughter :

3. No *bandus* may be a member of any family outside the four families discovered by Dr. Sarvadhikari among the enumerated *bandhus* of the *smriti* text: these are the family of the *propositus* and his agnate ancestors ; that of his mother's agnate ancestors ; father's mother's agnate ancestors ; or mother's mother's agnate ancestors. The effect of this is to exclude, for example, the daughter's son's daughter's son ; daughter's daughter's daughter's son ; and ascendants higher than the great-great-grand-parents (this is an academic point) and also the descendants

of the father's father's mother's father, the father's mother's mother's father, the mother's father's mother's father, and the mother's mother's mother's father.

439. This scheme of succession is subject to the general rule, which has been accepted throughout India since the early part of the last century at the latest, that a man may dispose by will of that which he could dispose of *inter vivos*, that is to say, gift and will are similar means of creating a title. Naturally the interest in coparcenary property at Mitakshara law cannot be disposed of by will, because it cannot be given except with the consent of all coparceners: with such consent, or as a matter of family arrangement, bequests of coparcenary interest can take place. This however is extremely rare.

2. *According to the Madras High Court.*

440. The Madras High Court differs from the Allahabad High Court in this, that everyone who is related within five degrees, no matter through which sex, or what family he belongs to, is entitled to be a heritable *bandhu* (secs. 444, 445). None of the Allahabad rules are accepted, nor is the analysis of Dr. Sarvadhikari upon which they rest. The simple criterion of propinquity is not however followed logically, since female *bandhus* are placed immediately after male *bandhus*, in the same order as their male counterparts, where appropriate.

441. A peculiarity of the Madras High Court is that female agnates except the sister are held entitled to succeed, as all females within the prescribed degrees, but are treated not as *sagotra sapindas* (for these are all males) but as if they were *bandhus*. The law on this point is not perfectly clear.

3. *According to the Bombay High Court.*

442. Confusion reached its zenith in Bombay. Here two systems divide the State between them. In Baroda a third reigned, but that will be dealt with below. In Guzerat, the Island of Bombay and North Konkan, the *Vyavahara-mayukha* of Nilakantha took precedence over the Mitakshara: in the rest of the State the Mitakshara is read subject to Mayukha rules. According to both the father excludes the mother; according to both the widows (as long as they have not remarried) of *sagotra sapindas* inherit immediately after the last member of the group of four, that is to say the brother's widow will take the estate in default of a brother's son's son. There was some controversy about the exact order of devolution. Although nominally in force certain rules peculiar to the Mayukha do not seem to have been applied by the courts and may be ignored here. Under the Mayukha, however, brothers and predeceased brothers' sons take together.

443. It is in regard to *bandhus* that the Bombay High Court's contribution is so interesting. There it has been decided[4] that the order of *bandhus* is not, as in Madras, a matter of placing all males before all females, but that where males and females compete, being all of equal claim, the females are to be excluded but not otherwise. A curious and regrettable Privy Council decision is responsible for the view that even in Mitakshara law the factor of spiritual benefit may be used to distinguish *bandhus*, and one result of this is believed to be to postpone the female to the male.

444. The categorisation of *bandhus* was in no Part A State a mere matter of propinquity. A remoter *atma-bandhu* will exclude a nearer *pitribandhu* and any *pitribandhu* will exclude a *matribandhu*. These distinctions require some

explanation. The ancient text which describes *bandhus* illustratively makes the distinction, and it is clear that the *atma-bandhus* are those descended from one's grand-parents or nearer, while the *pitribandhus* are those descended from the father's father's father or father's mother's father; the *matribandhus* are the cognates corres-ponding to these on the mother's side. Each class excludes the others in order because when once very close relations have been dealt with the general agnatic preference makes itself felt. All through the Hindu law of succession the preference for agnates, the possible members of a huge patrilineal joint family, was constantly felt and the large number of exceptions and adjustments does not hide it.

445. Further details about preference between *ban-dhus* of the same class and degree are that the *bandhu* was preferred whose highest ancestor was a male rather than a female root: and where both claimants had the same qualification, then probably the claimant whose ancestors had fewest female links would be preferred. Those descended from paternal relations would be preferred generally to those descended from maternal relations, and descendants of the *propositus* came first of all.

4. *In certain Part B States.*

446. Excluding Part B States and others mentioned below, it is important to remark that Central statutes did not always apply either by virtue of copying central statutes or by virtue of Merged States Laws Acts or Ordinances or the central Part B States (Laws) Act, 1951. In such States, of which Hyderabad is a good example, the widow would not take any benefit similar to that con-ferred by the Hindu Women's Rights to Property Act, 1937: nor would the Hindu Law of Inheritance (Amend-ment) Act, 1929, affect devolution.

447. Again, the central legislation which abolished (in regard to Mitakshara law only) the disqualifications such as change of religion, congenital blindness, virulent leprosy, loss of a limb, insanity (other than congenital insanity), deafness and dumbness, and so on, would not apply.

5. *In Baroda.*

448. The Hindu Act of Baroda, 1937, completely superseded the Mayukha and Mitakshara within that State so far as concerned the topics dealt with. It was a comprehensive statute, and has been considered fairly successful, though it combines archaic and up-to-date features. Although great care was expended upon the construction of the succession-law it is clear that minute care was not applied.

449. Excluded from succession are the congenital lunatic or idiot, and the *sannyasi*: this agrees with the Indian law, but when we come to the murderer's disqualification (see sec. 506 below) we find that only the one whose murder of the *propositus* is proved in a criminal court or the one who has instigated a murder is excluded. The requirement of proof in a criminal court is novel. The Code diverged from the general Hindu law in keeping the disqualification of those who suffer from a loathsome or contagious or incurable disease. The unchaste wife was excluded.

450. General rules of preference were laid down for all classes of heirs. These are interesting. One belonging to a descending line is preferred to one belonging to an ascending line ; one belonging to a degree where the male line is broken at a later stage by a female descendant is preferred to one belonging to a degree where the male line

is broken at an earlier stage by a female descendant. A male is preferred to a female : relations of the whole blood are preferred to those of the half-blood except in regard to *sagotra sapindas* or *samanodakas*. The old-fashioned terminology has been retained, though the spirit has been invaded and altered. Finally, the relations on the father's side would be preferred to relations on the mother's side: where none of these distinctions can be made the claimants would share the estate equally. Naturally, this arrangement makes a simplification even of the very reasonable Bombay rules.

451. After the son's son's son and the widow, who took a special benefit as a coparcener along with her sons but in the absence of male issue took the whole estate absolutely if it be below Rs. 12,000 in value, and the residue subject to the limited estate (see sec. 471 below), the next heir was the daughter. Illegitimate sons to take maintenance only (see sec. 393 above). The predeceased daughter's son might represent her. In the absence of daughters the following took the estate:

1. daughter's son ; 2. father : 3. mother : 4. son's widow ; 5. full brother : 6. full brother's son : 7. father's mother : 8. full sister, full sister's son (representing predeceased sister), and sister's daughter : 9. father's father : 10. daughter's daughter and sister's son (not including an adopted sister's son).

After these the nearest *sagotra sapinda* according to the rules set out above took the property : then *samanodakas*. The step-mother, the step-brother, cousins by half-blood would take as if they were *sagotra sapindas* : the half-sister would take in the absence of the half-brother : widows of *sagotra sapindas* and *samanodakas* took next in the same order as their husbands. Thus there were three startling innovations in close succession. As for the *bandhus, atma-*

bandhus on the father's side excluded those on the mother's side: this was quite new, but not illogical.

Full provision was made for succession to a reunited man. Since it was of very slight practical importance it is passed over here.

6. *In Mysore.*

452. Though the Mitakshara was left as the residual authority, the Mysore Hindu Law Women's Rights Act, 1933, had made such radical changes in the succession-law that it is not clear whether, after all, the enacted and the residual law were compatible with each other.

453. The scheme was to divide relations up into categories. The first step was to speak of the *family* of the *propositus*, his father's family, his father's father's family, and his father's father's father's family. After this last came the mother's family, the mother's father's family (presumably—the statute is vague), and so on. Each family consisted of the persons corresponding to the following, who are taken from the *propositus*' family:—

(*i*) the male issue to the third generation; (*ii*) the widow; (*iii*) daughters; (*iv*) daughters' sons; (*v*) the mother; (*vi*) the father; (*vii*) widows of predeceased sons; (*viii*) sons' daughters; (*ix*) daughter's daughters; (*x*) full brothers; (*xi*) half brothers; (*xii*) sons' sons' daughters, sons' daughters' sons, son's daughters' daughters, daughters' sons' sons, daughters' sons' daughters, daughters' daughters' sons and daughters' daughters' daughters: (*xiii*) widows of predeceased grandsons and great-grandsons.

454. The picture is somewhat confused by the fact that no abrogation of the general law of *sagotra sapinda-ship, samanodakaship* or *bandhuship* is to be found expressly in the Act, and the complex rules of preference seem somewhat out of place when an apparently reason-

ably complete list of heirs has been given. Preference among *sakulyas* (the reference is found in Sri Srinivasan's book) and *samanodakas* is regulated by rules such as point out the nearer line, subject to the novel rule that allows only three degrees from the common ancestor to be counted: within each line agnates were to be preferred to cognates: the nearer within each group to exclude the more remote: males preferred to females where the degrees are equal. Otherwise heirs of the same degree shared equally. This last step was a great advance: it is unfortunate that this simple rule, that claimants equally remote should share equally, does not much appeal to the Hindu legislator at present. Agnation seems to have a magic potency, and relations connected through males, or being themselves males, have a curious preference even in these days when joint families are smaller than they were, and a man's agnates may be as much strangers to him as his cognates, and in many instances are likely to be more so, seeing that the rivalry that often exists with one's cousins on one's father's side will never exist with one's mother's relations.

455. The position of the widow and certain other widows of the family is to be remarked. Mysore, like Bombay, allowed the step-mother to be an heir. Whatever was inherited by a female from another female or from her husband or son, or from a male relative connected by blood, except where there was a daughter or daughter's son of the *propositus* alive at the time when the property was inherited, was *stridhana*, and not held on a limited estate as would be the case in Madras or Allahabad.

(*ii*) *At Dayabhaga law.*

456. Bengalis and Assamese were governed by the system which has hardly altered since the time when Jimutavahana discovered that brilliant method of recon-

ciling the claims of a few near cognates with the ancient patrilineal, agnatic heirs. The doctrine of spiritual benefit, which is not strictly or logically observed in Dayabhaga law, served until 1956 as the basic *ratio* explanatory of the system. The words *sapinda* and *bandhu* have a different meaning in this context, since Dayabhaga law gave the estate to *sapindas* (within four degrees), *sakulyas* (up to seven degrees) and *samanodakas* (up to 14 degrees), then to the teacher, pupil and fellow-student, and finally the State. The position of the heirs in the order of devolution was based on their relative capacity to offer *pindas* or other offerings of spiritual benefit to the deceased in the *shraddha* ceremonies. The order was as follows:-

Son, son's son and son's son's son ; widow ; daughter ; daughter's son ; father ; mother ; full-brother ; half-brother ; full-brother's son ; half-brother's son ; full-brother's son's son ; half-brother's son's son ; sister's son ; father's father ; father's mother ; father's brother ; father's brother's son ; father's brother's son's son ; father's sister's son ; father's father's father ; father's father's mother ; father's father's brother ; father's father's brother's son ; father's father's brother's son's son ; father's father's sister's son ; son's daughter's son ; son's son's daughter's son ; brother's daughter's son ; brother's son's daughter's son ; father's brother's daughter's son ; father's brother's son's daughter's son ; father's father's brother's daughter's son ; father's father's brother's son's daughter's son ; mother's father ; mother's brother ; mother's brother's son ; mother's brother's son's son ; mother's sister's son ; mother's father's father, his son, son's son, son's son's son and daughter's son ; and finally the mother's father's father's father, his son, son's son, son's son's son and daughter's son. After these came the *sakulyas*, who were all males, and after them the *samanodakas* : both classes were calculated, it seems,

according to the principles which set out the list of *sapindas* given above. There is, however, a good deal of controversy on the subject, and Dr. Sarvadhikari, the best authority on the matter, and the Calcutta High Court are not in agreement upon the order.

457. The number of heirs is smaller, and only five females might inherit at Dayabhaga law. The old law of disqualification applied, and chastity was required of *every* female heir before she could succeed. All female heirs took a limited estate. The law of succession to a reunited coparcener at Dayabhaga law is omitted as too complex and doubtful and of too little practical value for discussion here.

6. *The law of succession to females before June, 1956.*

1. *According to Mitakshara law.*

458. Mitakshara law of succession to *stridhana* had been amended or abrogated in Mysore and Baroda (see below), but had remained almost unaffected either by statute or by the case-law outside those States except in regard to the question of the estate taken by the female heir, which (outside Bombay) was a limited estate. The *Mitakshara* itself greatly simplified what had been an extremely complex subject. It was in force all over India except in those States, to the extent that it was abrogated there respectively, and except in Malabar or the Punjab whether other statutory rules or customs took precedence. In Mithila and Bombay variations of Mitakshara law were in force which were in fact not so much sub-schools of the Mitakshara as deviations from it. They could not be called advances, though the authorities are later, for they are attempts better to reconcile the conflicting *smriti* texts, and the result was in each case greater complexity. In Bengal and Assam those females who were subject to Daya-

bhaga law were succeeded on intestacy by the Dayabhaga *stridhana* heirs. The Mitakshara never affected descent of *stridhana* in those parts.

459. An unmarried girl, at Mitakshara law, was succeeded by her full brother : mother : father ; father's heirs (as determined *prior* to the enactment of the Hindu Law of Inheritance (Amendment) Act, 1929)[5] : and mother's heirs.

460. A married woman was succeeded

(*a*) as to any *shulka* (property given to her by way of bride-price) by full brother : mother : (perhaps) father ; father's heirs :

(*b*) as to all property other than *shulka* and property held subject to a limited estate, by unmarried daughters : destitute or very poor married daughters ; other daughters : daughter's daughter : daughter's son ; son : son's son : then *if she was married in an approved form* (Brahma or Gandharva) by her husband and after him his heirs (calculated as prior to the Act of 1929) ; then to her blood relations and then to the State :

but *if she was married in an unapproved form* (Asura) the property was taken by her mother ; father : father's heirs ; and then by the husband's heirs before the State took as ultimate heir.

As to the requirement of legitimacy for succession to a woman's property it may be remarked that illegitimate *children* had rights of succession but not equal to that of legitimate children. The situation was obscure.[6]

461. The above was, briefly, the general Mitakshara law. But the Bombay High Court had developed the Mayukha sub-school and its details differed from the Mitakshara law considerably. Under the Mayukha *stridhana* is divided into technical (*paribhashika*) and non-technical *stridhana*. Technical *stridhana* includes all the enumerated types of *stridhana* found in the *smritis* ; the rest (which

includes some inherited property in Bombay State) passed by a distinct order of devolution.

462. *Shulka* passed as before (sec. 460) : *yautaka* (gifts at time of marriage) passed to unmarried daughters, but afterwards the order was uncertain : *bhartidatta* and *anvadheyaka* (gifts and bequests from the husband and gifts from relations subsequent to marriage) went to sons and unmarried daughters : sons and married daughters : daughters' daughters and daughters' sons : sons' sons : husband and husband's heirs (if marriage in approved form) or mother, father and father's heirs. Other kinds of technical *stridhana* than those mentioned above went rather to unmarried daughters : married daughters who were destitute or very poor : other married daughters : daughters' daughters and daughters' sons : sons : sons' sons and so on as above. Non-technical *stridhana* went to sons : sons' sons : sons' sons' sons : daughters : daughters' sons : daughters' daughters and so on.

463. Mithila did not recognise non-technical *stridhana*. Technical *stridhana* other than *shulka* and *yautaka* passed to sons and unmarried daughters in equal shares. If a woman died without issue or husband the husband's heirs did not take, according to the Calcutta High Court, as under the Mitakshara, but the husband's sister's son, the husband's brother's son, and the husband's younger brother were preferred to other heirs of the husband. The Patna High Court has refused to follow this decision.

2. *According to the Dayabhaga law.*

464. *Shulka* passed as before, but the Calcutta High Court arranged the heirs slightly differently: the husband taking after the father. A maiden's property was not distributed exactly as in Mitakshara law, since the sister and the sister's son were preferred to the father's brother's son.

465. *Yautaka* passed to unbetrothed daughters; bethothed daughters; married daughters who had sons or were likely to have sons; barren married daughters and childless widowed daughters; sons; daughters' sons; sons' sons; son's son's sons; step-sons; step-son's sons; step-son's son's sons. If the marriage was in an approved form the husband, brother, mother and father took, otherwise the mother, father, brother, husband, then the husband's younger brother; husband's brother's son; sister's son; husband's sister's son; brother's son; daughter's husband; the remainder of the husband's heirs at Dayabhaga law; and finally the father's heirs.

466. Gifts and bequests from the father after marriage passed as *yautaka* with this difference that sons excluded married daughters; and if the woman died without issue the brother, mother, father and husband took in that order. *Ayautaka* (gifts and bequests from relations made before or after marriage) passed to sons and maiden daughters (unbetrothed); married daughters who had sons or were likely to have sons; son's sons; daughters' sons; barren married daughters and childless widowed daughters. Here the chief textual authority is divided as to the order, the *Daya-karama-sangraha* placing the son's son's son, step-son and step-son's son and step-son's son's son before the childless daughter. On failure of all these the following took irrespective of the form of marriage: brother; mother; father; husband; husband's younger brother; husband's brother's son; sister's son; husband's sister's son; brother's son; daughter's husband; husband's heirs; and father's heirs.

3. *In Baroda.*

467. The property of an unmarried woman passed to her full-brothers; mother; father; father's heirs.

468. The property of a married woman was divided

into *stridhana* and "other property of a woman with absolute interest". The latter included that inherited property which was not taken, under Baroda law, subject to a limited estate. The first class passed to sons and daughters ; sons and daughters' daughters ; sons' sons ; husband ; mother ; father ; sister ; sisters' children ; brother's children ; husband's heirs ; father's heirs. The other property passed to sons ; grandsons *per stirpes* ; great-grandsons similarly ; daughters daughters' sons *per stirpes* : husband ; mother ; father ; sister ; brother ; sister's children ; brother's children ; husband's heirs ; and father's heirs.

4. *In Mysore.*

469. Children excluded grandchildren. But as to ornaments and apparel and gifts of all kinds and all sources the daughters ; daughters' daughters ; daughters' sons ; sons ; son's sons and daughters took in that order. Next after grandchildren came the husband, *if any* (*i.e.* children illegitimately connected with the *proposita* either directly, as children, or indirectly as grandchildren, appear to be entitled to inherit) : then the husband's heirs, as given in the Act. Next came *uterine* (does this equal "full" or literally uterine, by same mother but not same father?) brothers and sisters ; mother ; father ; father's heirs. This simplification does not seem to simplify quite as much as is needed, and the serial method of distribution, *i.e.,* not allowing near relations to share, but allowing one to exclude another in a very long series, was regrettably allowed to persist.

5. *Customary laws.*

470. In French India (other than Chandernagore) the widow took an absolute estate, and so also the widows of certain Jain communities: the inheritance thus

passed on her death unexpended as *stridhana.* It would be pointless to detail all varieties of customary successions to *stridhana,* of which the most important recorded were in force in the Punjab. The *shastric* and Anglo-Hindu laws were sufficiently complex and had adequate uncertainties for the main point to be already driven home: succession to *stridhana* was from every angle of view over-ripe for reform. But one custom which was recently noticed and warmly approved by the Madras High Court will serve to illustrate the scope for variation which existed. The Kamma families of Andhra have been proved[7] to follow a custom that if a husband and wife become estranged the *stridhana* given to both bride and bridegroom by the bride's relations had to be given back to the bride: it would follow that on the bride's death the husband could not inherit that property in the absence of issue. This is an inference, but is almost certainly correct.

7. *The question of the woman's limited estate.*

(*i*) *The shastric position.*

471. The *dharmashastra* commenced with the supposition that a woman could not be the owner of anything. Later it was conceded that she was essentially competent to own. Then categories of ownership were set out for her benefit, according to the practical probabilities of the day. The South Indians in particular were not averse to admitting woman's ownership in things because it seems that the Dravidians and others had never doubted it. The Mitakshara viewpoint, which is substantially Southern, is thus natural: all property owned by a woman is *stridhana.* But this conclusion, which would allow a woman to dispose freely of property inherited, for example, from her husband, was not acceptable to jurists of later centuries, and it was

accepted all over India, with possible exceptions on the Western side, that though a woman could inherit, her inheritance was not for an absolute estate, but a limited estate. She was, in brief, to have the use of the property during her life, and after her death the next heirs of her husband would take the remainder.

472. A strange misunderstanding has taken place in recent times. References to the Mitakshara are constantly made for the proposition that property inherted by women ought to be *stridhana* and disposable by the heiress at her pleasure. Of course it does not follow that because property is *stridhana* it is therefore freely disposable. *Asaudayika-stridhana* can still be disposed of at Mitakshara law only with the husband's consent if he be alive.[8] But the fact is that the Mitakshara definition of *stridhana* is obsolete, and has been obsolete for many centuries in the *dharmashastra*.

(ii) The position prior to June, 1956 (when it was totally abolished).

473. Hardly any subject has given rise to so much litigation as the *woman's estate*, otherwise known as the *widow's estate*. It was a peculiar estate, and had nothing comparable with it in any other system. The widow or woman heiress owned the estate, and fully represented it in litigation, but could not bind the estate by acts except those which were authorised by law. The reason for this was that, though she was an owner, the limitations upon her ownership existed for the purpose of protecting the expectancy of the next heir, who might be a male or a female. This next heir was called "reversioner", since he or she had an expectant interest in the reversion of the estate in the woman's hands. Since the theory was that the husband's succession opens not when he himself dies (which seems strange enough) but when she, as his surviving half, died

or surrendered, the woman's limited estate was a curious kind of suspending right over property which intervened between absolute estates. The actual reversioner was the person who took the property when the widow died, forfeited or surrendered, while the presumptive reversioner was the person who at any particular time would be the next heir of the husband or male owner if the female holder were then to die, forfeit or surrender.

474. The great objections to the woman's estate were not chiefly raised for *her* advantage. Young and inexperienced women were protected by an estate which they could not alienate except for very limited purposes. Since they were entitled to maintenance at their own discretion out of the corpus of the property, and could alienate the corpus for their lives or until they forfeited or surrendered, they could derive quite large benefits from it. The gravest objection to the system was not that it might impoverish widows, for it could not do this since they might (unlike life-tenants usually) use the corpus of the property as well as the income for their maintenance, but that it gave rise to enormous technicalities and uncertainties, undue litigation, fraud, and the depressing of the value of the property, since a purchaser from a widow, for example, generally felt he bought a lawsuit or two into his bargain.

475. The widow was entitled to alienate her husband's property, or a mother her son's and so on, for the payment of the male owner's debts, even time-barred debts, though not her own time-barred debts:[9] for the securing of her maintenance, so far as necessity required the particular type of alienation in question ; for the protection of the property itself and its more efficient management ; for making presents to persons, such as daughters or sons-in-law or other near relations to whom such presents ought to be made out of the husband's estate according to local custom ; and for

the doing of acts of *dharma*, such as the erecting of temples or dedicating of idols or tanks or making of gifts to Brahmins or the poor, which would be conducive to the spiritual benefit of her husband—this would be valid so long as the amount spent on that purpose was not unduly large, and if she chose to go on a pilgrimage for that spiritual benefit there was an apparent rule that the pilgrimage should not be unduly prolonged. Upon all these rules infinite disputes might be entered into as to whether the particular alienation might fall within the permitted or the non-permitted categories.

476. Reversioners could sue for a declaration that a particular alienation would not bind the reversion, but the reversioner's attitude while the alienation was pending might be of the utmost importance and here again the Courts are not in agreement. The general view is that the consent of a reversioner who is the nearest in the line of descent will take the place of proof of necessity or benefit to the estate, and an alienee who took the consent of the nearest presumptive reversioner need not bother further to enquire into the existence or otherwise of the excuse for the alienation. As a rule it is believed that once a reversioner had given his consent he could not dispute the alienation when he had actually inherited the estate. It is a fact in any case that other reversioners would not be bound, should they in fact inherit, by the consent of the presumptive but not actual reversioner. But the Andhra High Court has taken the view that the consenting reversioner himself is not bound, there being no evidential obstacle such as is known as an estoppel, unless he takes some consideration from the alienee for his consent![10] Apart from this controversy it is universally agreed that the reversioner who adopted the alienation subsequently rendered the alienation good for all time, since subsequent assent is as good as

prior consent for the purpose of ratifying an essentially voidable transaction.

477. If the widow allowed a stranger to obtain adverse possession against her she herself might be debarred from rescuing the possessed property from the usurper: but the reversioner would not be so debarred, and the stranger could not plead limitation, since the widow did not represent her reversioner.

478. She might make a valid alienation for any purpose she liked for her life, or until she forfeited or surrendered. This title was a good defeasible title, and the purchaser might pass it on to a third party, thence to a fourth party and so on. But she must beware of alienating without the consent of a co-widow, even if she had separated from her and had never met her for years—the alienation would be invalid.[11] Alternatively, if she had not that difficulty to contend with, while the property was being held by someone who had never heard of the widow, that lady might forfeit her estate, and the reversioner might recover it from the man who had purchased it in good faith and without notice of the defect in the title. Surrender and forfeiture both occurred by her own voluntary act. If she remarried she forfeited, except in Uttar Pradesh and some few places in North India, where, if there is a caste custom allowing her to remarry the Hindu Widows' Remarriage Act of 1856 did not apply to her, and there was no compulsory forfeiture unless the caste custom also involved a forfeiture. She might forfeit by adopting a son (sec. 305 above). She might forfeit by becoming a *vairagini*, a matter which hung upon the *dicta* of three old Bengal cases, and which had not been the subject of any recent decision. She forfeited for *subsequent* unchastity in Punjab customary law.

479. Surrender raised delightful academic problems and no small practical worry. It was not a gift or a transfer

(the distinction may be subtle but is important), but an effacement of the widow's existence. It must operate over the whole of the property and must not be a device to split the property between a presumptive reversioner and the widow. But the widow might stipulate for a provision for her maintenance. The surrender then accelerated the rights of the presumptive reversioner, who might step in and avail himself of rights which might not be open to the widow herself.[12]

480. A view is held by some High Courts that a widow holding a limited estate could only hold property by adverse possession for the benefit of her husband's estate and never for her own.[13] Similar difficulties arose concerning her power of making accretions out of income to the estate itself.

481. The Mysore statute allowed a female heir to take only a limited estate when she inherited from a male other than a husband or a son or from a male relative connected by blood, when there was a daughter or daughter's son alive at the time when the succession opened. By releasing his interest the next reversioner could give her a full estate. She might dispose of the income by will (an astonishing proposition for the former British India). The next reversioner's assent or ratification would make the alienation good against all the world. The Act defines "necessity" in a suitable manner. A *partial* surrender is authorised. This again was a novelty. Alienations were not to be affected by surrenders. Unappropriated income would be *stridhana* in any event.

482. In Bombay and Baroda the limited estate played a smaller part, but where it operated its characteristics were the same as in the rest of the former British India. The Mysore situation was a special amalgam, toning down the

technical irregularities and awkwardnesses of the system without removing it entirely. Yet there was much in the Mysore approach which might have been imitated with profit.

(iii) The effect of the Hindu Succession Act.

483. It will be remembered that the Hindu Women's Rights to Property Act, 1937, gave certain benefits to widows, both in joint family property and in separate property. But whatever property they took under the statute was taken subject to the limited estate. The outright abolition of the limited estate was not seriously proposed until 1941. In the interests of widows themselves and of their families by marriage, some measure of restriction over their alienations and protection by the law of the estate in their hands for the benefit of the husbands' heirs or coparceners might be thought desirable. The technical difficulties inherent in the system as it worked until June 1956 (outside Mysore) might be overcome without necessarily removing the entire system. If however female heirs were given exact equality with male heirs, certain fundamental rights would be satisfied and the public would be obliged to adopt an alternative method of giving the required protection. This is open to them without undue difficulty. A draft form of will could be cheaply obtained, by which the coparcenary interest would go to the widow for a life estate with power of sale of the corpus for maintenance and without liability to account for the expenditure of the income, with a gift over to the surviving coparceners. There would have been no difficulty in obtaining the coparceners' consent to such a testamentary disposition (and even this is not required under the new Act). Similarly separate property could be disposed of subject to an appropriate life estate. Such would be the result of

the abolition of the *woman's estate,* and it was hardly likely that very untoward results would ensue.

484. There was however another aspect of the matter. If the Legislature was to grant wide rights of inheritance to women, which was desirable, it would be encouraged to do this by the knowledge that the female heiresses would only interrupt the flow of the property from male to male. Joint families in particular are anxious that their capital should not be diminished or subject to unforeseeable fluctuation by reason of interests being vested by statute absolutely in females. Thence a compromise similar to that adopted in Baroda might have had much to recommend it.

485. The Hindu Succession Bill (Sixth draft) did not give us a lengthy account of the limited estate : nor did it entirely abolish it. It took a more subtle path, and one that called for some admiration. The Section (16) tells us that inherited property and property taken at a partition is to be *stridhana* and will pass on intestacy as such. But from this statement the following exception is made:

> "Nothing contained in sub-section (1) shall apply to—
>
> (*a*) . . . .
>
> (*b*) any ancestral property acquired by a female Hindu by way of inheritance or at a partition, where under any law or custom or usage a male owner acquiring any such property in similar circumstances would have held it subject to restrictions on his right of alienation with respect thereto :
>
> and any such property shall be held by the female Hindu . . . . subject to the same restrictions as would have applied if the property had been held by a male owner."

As I understand this, there would be no limited estate in the present sense anywhere. All property inherited by

a woman or taken by her at a partition would be her *stri-dhana,* except for that property which she took in *ancestral property,* that is to say joint family property, which she would hold subject to exactly the same conditions as a male holder. Thus where a coparcener died subject to Mitakshara law and his widow took his interest, she would be able to alienate it without the consent of the other coparceners (see sec. 383 above), and could validly bind that interest, but no more. There would have been some difference between the effect of this section if passed before the Joint Family Part of the "Code" or afterwards. If passed before, it would follow that the current law which restrains a coparcener's dealing with ancestral and joint family property, which is quite extensive, would affect also widows taking either under the Act itself or at Hindu law by a partition between sons of the joint family property. If passed after the Joint Family Part, then the only restrictions upon the widow taking under the Act would have been such rare restrictions as were imposed by local customs or statutes or by the nature of the estate, in so far as these rules were not abrogated by the "Hindu Code" itself. For there will be no restrictions imposed in the Joint Family Part on the alienation by an heir or coparcener of his interest or inheritance. At any rate during the transitional period, if any, the distinction between a coparcener's interest and a widow's interest, such as existed under the Hindu Women's Rights to Property Act, 1937, will disappear. The whole matter will no doubt be cleared up if and when the Hindu Joint Family Act is passed.

Meanwhile we must adjust ourselves to the fact that Section 14 of the Hindu Succession Act, 1956, totally abolishes the 'women's estate', and from now onwards no restriction applies at law to woman's powers of disposition of her property, however acquired.

(*iv*) *The result.*

486. If, as is supposed here, the joint family law is itself to be reformed and individual coparceners will have unfettered disposal over their interests, there seems no harm in giving equal freedom to the female heirs. Where however the widow inherits along with sons it might be claimed by the "orthodox" as improper that on her death it might fail to pass to her *stridhana* heirs, who will include those sons as well as daughters, since she would be free to dispose of it by testament. In their opinion she ought to be obliged to visualize the property's going to them. And if testamentary disposition away from the husband's male issue were to be denied her, there must be some restriction upon her power to make alienations *inter vivos*: otherwise she could easily evade the regulation by gifts, even gifts on her death-bed. It would follow therefore that some limited estate is actually necessary. The only answer to this point of view is that unless widows are trusted to dispose of property justly they will never be worthy of trust, and the husband who fears such a result must make a testamentary disposition of his own accordingly. This may not seem, to some critics, to be a conclusive answer and these might have been prepared to accept a mid-way solution, giving her free disposition up to a quarter of the estate except for necessity, and "necessity" could have been defined. The whole law of "surrender" could have been abandoned and likewise she could have been exempted from fear of forfeiture on any ground. But since Parliament has abolished the 'women's estate' it is inevitable that the public will be driven to adopt shifts such as have been suggested above, and the more backward of our agricultural communities and the poorer citizens of the towns will suffer real hardships until either a common

form of evading the intention of the statute becomes widely known and cheaply available, or the public attitude to the whole subject develops along new lines.

8. *Succession in Malabar patrilineal communities.*

487. It is not possible here to give a full account of the pre-1956 Malabar statutory orders of succession, but a few references will suffice. "Nambudri law" is the best example, but it is not unique.

488. Nanjinad Vellalas were governed by Travancore Act VI of 1101 (Malabar era = A.D. 1926). The property of males went to children or the lineal descendants of predeceased children subject to the widow's right of maintenance; in the absence of descendants the widow took without power of alienation except where the income did not suffice for her maintenance; then came the mother; father: mother's lineal descendants. The property of females went to children or lineal descendants of children; husband without power of alienation: mother's lineal descendants: father. In default of all other heirs the spouse took an absolute estate. A divided share in *tarwad* properties would pass as separate property for the purposes of intestate succession.

489. Travancore Malayala Brahmins were succeeded on intestacy as follows (Travancore Act III of 1106): males by their widows and children and *illom* (or house), depending upon whether or not they were survived by non-Brahmin wives and children as well as caste wives and children. The share in the latter case was *per capita*. The *illom*, the patrilineal family, was the residual heir in any case. A Malayala Brahmin female was succeeded by her children, or their issue by representation: or in their default by the husband, and in his default by her husband's *illom*. An

unmarried woman's property went to her parents; her brothers and sisters or in their absence to her *illom*.

490. Nambudris in Madras (governed by Madras Act XXI of 1933) were succeeded as follows: caste widows, sons and unmarried daughters and the issue in the male line of predeceased sons by representation were entitled to equal shares: then came the father: mother; brothers and sisters; sons and unmarried daughters of brothers; father's father: father's brothers: their descendants in the male line, the nearer excluding the more remote; father's remoter ascendants and their descendants similarly. All this was subject to the rule that where a non-caste wife was left and/or non-caste issue, these were entitled to one-half of the estate. A Numbudri married female was succeeded by her children: children of predeceased sons; sons of predeceased daughters; husband: father: mother: brothers and sisters: brothers' and sisters' children: and finally by relations of her husband. An unmarried girl's property devolved on her parents: brothers and sisters, or finally the *illom*.

491. Travancore non-Marumakkattayi Ezhavas were governed by Travancore Act III of 1100. They were formerly a *Misrattayam* community which allowed benefits to go to the intestate male's family and children as well as to his *tarwad*. Now the *tarwad* took half of the estate and the children or grandchildren took the other half, or in their absence the widow.[13*] After the deceased's *tavazhi*, the maternal grandmother's *tavazhi* took. Ezhava females' children succeeded them and their descendants in the *female* line: after these the husband might share with the mother's *tavazhi*, half and half.

492. Cochin Thiyyas are divided into two classes: *Makkattayam* (patrilineal) Thiyyas and others. The others were in a half-and-half situation and were governed by

Cochin Act VII of 1107, while the *Makkatayam* Thiyyas themselves were governed by Cochin Act XVIII of 1115. Non-*Makkattayam* Thiyyas were succeeded as follows:—males by their widows and next of kin: females by the husbands only where there were no descendants, but otherwise by their husbands and next of kin. The scheme is of the greatest simplicity and deserves separate treatment (see sec. 494 below). The *Makkattayam* Thiyyas were succeeded as follows:—wife or husband shared with the "kindred"; the widow took a share equal to a son, or in default of a son or lineal descendant of a son in his place, a share equal to a daughter; where the intestate was a male the daughters took half the share of a son and where the intestate was a female the daughters took equal shares with the sons: the widow took half the property when competition was between a spouse and parents, descendants of the father, or father's father: otherwise the whole: if no spouse was left the lineal descendants or next of kin took. Father and mother took equal shares: then father's descendants as if the property had been the father's and he had died just after the intestate: then paternal grandparents: then descendants of paternal grandfather as before; after them the "nearest degree of kindred" took. The meaning of this expression was not explained.

9. *Succession in Malabar bilineal communities.*

493. *Misrattayam* was not really biliny, in that what was required was that the estate was divided between two quite distinct classes of claimants. In biliny properly so called the estate passes to relations related on the father's and mother's side equally and without preference for either. This is the most logical and most mature type of succession and is the one towards which every country which does not enjoy it already is moving gradually. The

best example is that given in the Cochin Thiyya Act, Act VIII of 1107.

494. Where the intestate had left a widow, the widow took a fourth as against descendants, a half against other kindred, or the whole if there were none. The husband was in the same position except that, as was mentioned above, he did not compete with descendants. Amongst descendants distribution was by the *per stirpes* rule without distinction of sex or preference for males as in the Makkattayam Thiyya law, where females transmitted a right only to a half share. After descendants "kindred" included mother, father *and* brothers and sisters *per capita* or their representatives *per stirpes* without regard for the sex of predeceased brothers or sisters : then the nearest of kindred. "Kindred" was defined as the connection or relation of persons descended from the same stock or common ancestor. A schedule was given, but without explanation as to whether it was illustrative or exhaustive. It is clear that as regards sex it was only illustrative, not providing for sisters, etc., so the inference is inescapable that it was only intended to reveal that relationship is to be traced through both sexes and that relative nearness is a matter of degree only, and that the great-uncle's son and the cousin-german's son are in the same degree of nearness (and thus share equally). Thus apparently no limits of degree were set to inheritance.

495. Furthermore, the last remnants of *Marumakkattayam* in the case of those subject to the Act (who fell half-way between pure *Makkattayis* and *Marumakkattayis*) was removed by the rule that *tarwad* property which belonged, at the time when the Act came into force, to those who were then living, as if it had descended to them by succession from the nearest common female ancestress.

10. *Succession in Malabar matrilineal communities.*

496. Even in 1956 pure matriliny did not exist in Malabar, certainly not in Madras or Cochin and probably not in Travancore. It existed in other remote parts of India, but details of these laws are not authoritatively known.

497. The most important statutes were the Cochin Marumakkattayam Act, the Travancore Nair Act, the Travancore Kshatriya Act, the Madras Marumakkattayam Act and the Madras Aliyasantana Act. Details of their rules would be unduly tedious.[14] The general principles will suffice. The *tarwad*, usually represented for this purpose by the *tavazhi*, shared with the spouse, but was excluded by descendants. Most Acts allowed descendants in the female line only to inherit from a male (or a female), but one recent statute allowed descendants through either sex to inherit. No limit of degree was placed to the heritable right of descendants. The spouse shared with the mother's *tavazhi* or grandmother's *tavazhi*, the absence of the one giving the estate to the other. The last heir was the highest *tavazhi*, which would be equivalent to the *tarwad*. The old rules which distinguished the divided from the undivided heirs were not retained, except in one statute, where the rights of undivided *Marumakkattayam* heirs only were preserved. Recent judicial decisions had made it clear that fresh *Marumakkattayam* property can be created by the birth of issue to a woman who had taken a share by partition of *tarwad* properties, and there is no doubt that the existence of *Marumakkattayam* heirs and *tarwad* properties as a parallel institution with descent to children and spouse would have continued for a very long time. Women's property went to the children and husband, and apart from the intrusion of the husband there had been

hardly any change in the original *Marumakkattayam* law in their regard. Aliyasantana law, though a type of *Marumakkattayam*, differed from it by statute in that descendants through sons and grandsons were equally eligible with descendants through females. It was this feature which the Fourth Draft sought to force upon Malabar *Marumakkattayis*, it would seem, surreptitiously: when the Draft was criticised in this regard the Hindu Succession Bill, which was the Fourth Draft's successor, was amended before introduction in the Council of States, and the Sixth Draft (Succession) left Malabar law severely alone. A wise course might have persisted in this so that the local legislatures might have enacted suitable legislation to tidy up their jungle of statute law on succession and other matters of family law; but the recent Act has reverted to a previous plan and has tied the hands of local experts (see below).

11. *The Hindu Succession Bill and the Act of 1956.*

498. The Sixth Draft (Succession) had several sensible features. In the first place Scheduled Tribes were temporarily exempted, and in the second, as we have seen, the sections found in the Fourth Draft and the Fifth Draft (Succession) dealing with Marumakkattayam and Aliyasantana and "Nambudri" laws were omitted, the greater part of the latter problem being left for later attention. In the first feature the Act (Sec. 2 (2)) persists, but the second it abandons. All *Marumakkattayis* and *Aliyasantanis* are to be governed, except in respects of little practical importance, by the general law (Secs. 2, 3, and 4) and a vigorous effort is made gradually to destroy *all* Malabar joint family tenures, whether patrilineal or matrilineal (Sec. 7). Malabar bilineal laws are abolished by implication.

499. The general scheme of the Bill was to leave testamentary succession untouched. The Act is more bold and gives the coparcener or member of a Malabar joint family a conditional power of disposing of his undivided interest by will (Sec. 30 (1) read with Sec. 6). Intestate succession is much simplified, but the method used calls for a considerable amount of criticism.

(*i*) *The general scheme of succession.*

500. There was to be no distinction between Mitakshara and Dayabhaga, except that succession to an interest in a Mitakshara coparcenary was to be governed by the provisions of the Joint Family Part of the "Code". But the Act retains the Mitakshara coparcenary for a limited purpose and in a limited guise. Commencing (Sec. 6) with the general proposition that the undivided interest devolves by survivorship (as previously), the Act provides that where the *propositus* dies leaving a surviving daughter, widow, mother, or daughter's son (it is still quite uncertain whether the widow of a predeceased son or the widow of a predeceased son of a predeceased son was intended to be included in this curious list, but it is submitted that they are not, upon the bare terms of the Proviso, to be included) he is free to dispose of his interest by Will to anyone he chooses, subject to the maintenance rights of those entitled under the former law (until the Maintenance Part of the "Code" comes into force), and if he does not effectively dispose of the interest by Will the interest will be deemed to be a divided share and will pass by succession to his intestate heirs. It is very odd that the line of succession should depend upon the existence at the *propositus'* death of relations, such as a married daughter, who may not be beneficiaries in actual fact at all.

501. Reunion is abolished, so far as we can tell, since no mention is made of it in the Act. The argument that reunion continues because it has not been explicitly abolished is probably unsound since the Act tells us how property will devolve and the words used are exhaustive.

502. Customary successions and peculiar laws for *devadasis* are abolished except with regard to Scheduled Tribes and insignificant fragments of the Malabar statutory laws. Illegitimate children do not retain the same rights as under the former law, since relationship must be legitimate except for the mutual succession of illegitimate children and their mother and *inter se*, but although an illegitimate child may not inherit from a legitimate collateral he or she may count as a legitimate relation for the purposes of claiming through his or her mother—a substantial improvement. The special status of the Shudra's *dasiputra* is to be abolished. Impartible estates are, with special exceptions, totally abolished.[15]

503. It is very curious that the very interesting and satisfactory Cochin Thiyya Act (VIII of 1107) is not saved by Sec. 5 (*iii*) of the Bill, and that the 1956 Act abolishes by implication the law set out in the relevant parts of that Act and the Cochin Makkathayam Thiyya Act (XVII of 1115), and persons previously governed by those Acts will be governed by the general law. (It would seem that this is an oversight, which may cause hardship. It is a retrograde step in any case.)

504. Many old distinctions between heirs are to go: divided sons are to share with undivided sons. This was stated in so many words in Sec. 7 (1) of the Sixth Draft, but is to be understood by implication in the Act itself. Married, unmarried, childless or fruitful, degraded and undegraded, poor and well-to-do women are equally eligible and take without preference *inter se*. Formerly there was a

custom whereby degraded heirs were preferred to undegraded heirs and respectable married member of a prostitute class did not succeed to the *stridhana* of her degraded sister.

505. Succession is divided into succession to males and succession to females: it has not yet been found possible to equate the two. And males were divided into two classes in the Sixth Draft: those who have finally left the world and those who have not. This special provision for hermits was characteristically Hindu. But the Act completely ignores them and thus makes a complete break with tradition.

506. Unchaste wives were to be disqualified if their unchastity was proved in matrimonial proceedings but not otherwise.[16] But the Act has totally abolished unchastity as a disqualification, and has thus affronted universal Hindu sentiment. Remarrying widows of certain close male agnates are disqualified from inheriting in that capacity. Murderers, or those who abet the commission of a murder, are to be disqualified not only from inheriting the property of the murdered person, but, not less justly, from inheriting property in furtherance of the succession to which the murder was committed, etc.[17] They may nevertheless utilise murder to benefit their descendants since a former rule tending to prevent this is abolished.

507. As at present, the descendants of persons who have been converted from Hinduism to another religion are disqualified from succeeding to a relation of the converted person, though he himself may inherit. The disqualification disappears if the claimant becomes a Hindu before the opening of the succession. It is really unfortunate that this rule survives.[18] No other disqualifications remain, and the biggest change will be felt at Daya-

bhaga law. Even the congenital idiot will be admitted at Mitakshara law.

508. On failure of heirs the Government will take the property subject to the obligations and liabilities to which an heir would have been subject.

(*ii*) *The order of descent and distribution on intestacy.*

509. The succession to males:- first come what the Bill called the "preferential heirs", then the agnates, then the cognates. Preferential heirs are divided into two classes. The first class consists of near relations who take together in one block subject to a peculiar method of sharing. The second class consists of a series of relations arranged in order of preference.

510. Class I in the Sixth Draft consisted of the son: widow (whether separated or otherwise): daughter: son or daughter of a predeceased son: son or daughter of a predeceased daughter: widow of a predeceased son: son of a predeceased son of a predeceased son: widow of a predeceased son of a predeceased son. To this list Parliament added the mother and the daughter of a predeceased son of a predeceased son. By what may prove to be a tragic oversight adopted sons are inferentially excluded. It is strange that no further descendants were included in this group. It thus combines an archaic flavour with an endeavour to avoid the worse effects of the Hindu Women's Rights to Property Act. For the method of distribution amongst these preferential heirs is ingenious, though it may give rise to difficulties where this novel compulsory fragmentation is not evaded by testamentary disposition. According to the Sixth Draft the widow (or widows) and the sons took a share each. The representatives of predeceased sons, being sons, widows and daughters, took the share of the represented person between them, the daughters

taking half the share of the sons, but if no son was found in that branch, only half a share was to be divided between the representatives. The daughters were to take a half share in the estate, and predeceased daughters were to be represented by their issue of either sex equally, and so on *per stirpes*. The Act, however, greatly improves the scheme by equating the daughter's share to the son's share (the interests of sons, etc., are somewhat protected by special provisions in Secs. 22 and 23), and by introducing the mother (but not apparently the step-mother or grand-mother) as an equal sharer with children.

511. After Class I come Class II, arranged as follows:—

> (1) Father ; (2) both the remaining grandchildren of sons together with brothers and sisters ; (3) all the grandchildren of daughters ; (4) brothers' and sisters' children ; (5) father's parents ; (6) father's and brother's widows ; (7) father's brothers and sisters ; (8) mother's parents ; (9) mother's brothers and sisters.

512. After this rather odd collection come the remaining agnates and after them the cognates, except for Marumakkattayis and Aliyasantanis (Sec. 17 (1) of the Act) who alone enjoy the privilege of equal competition between agnates and cognates. These have been settled upon a novel plan. Under the Bill no one of them could inherit unless he was within five degrees counting exclusively (or six degrees counting inclusively) of the *propositus*, and the method of counting was to go at once up the family tree and down again, not as at present to count independently the two arms of the tree. Thus the scope of inheritance was going to be drastically cut down. How the number six was arrived at is a mystery, and indeed that method of cutting off the right to inherit, though practised in the

Civil Law world,[19] was not necessarily the best. In fact the father's father's son's son's son would take, but the father's father's father's son's son's son would be excluded, and the higher we go up the tree the fewer degrees we would come down. This was a self-frustrating method of fixing an order of devolution, and it is not surprising that Parliament refused to accept this scheme and insisted on the extreme limit of agnation and finally cognation being reached before the Government could come in (with some difficulty) as *ultimus heres*.

513. The method of deciding priority among agnates or cognates, so limited, is interesting. The Bill gave the following rules which were a stage (though only a stage) better than the Bombay rules on bandhuship at Mitakshara law (sec. 443 following): preference was to be given to

1. the one who has fewer or no degrees of ascent *i.e.*, a descendant of the *propositus* ;
2. where degrees of ascent are the same or none ; the one who has fewer or no degrees of descent, *i.e.*, the nearest descendant, or the nearest collateral descendant of an ascendant, such as a sister's son :
3. where the degrees of descent are the same or none, the one who is in the male line where the lines are distinguishable :
4. where still not distinguishable, the male was to be preferred to the female ;
5. in the last resort all were to share together.

But Parliament very properly refused to continue these archaic distinctions, and, in Sec. 12, enacted that only rules 1, 2, and 5 of the above list should remain : and thus the very simplest rule of propinquity, without regard for sex has been laid down for the first time in India[20]: a reform as momentous as it is revolutionary.

514. Succession to females:—children, including the children of predeceased children by representation; husband; parents: husband's heirs: mother's heirs; father's heirs. This was the simple scheme of the Sixth Draft.

515. It will be remembered that the Sixth Draft intended to ignore the special Malabar laws. Since Parliament reverted in fact, as has been stated above, to an earlier approach, and enacted provisions which will virtually obliterate the *illom*, the *tarwad* and so on, and at least legally cancel almost all the differences between a Mitakshara, a Dayabhaga and a Malabar male as regards his separate property, and the corresponding females in all regards of succession to property, it was inevitable that the position of women should be reviewed once more, in order that it might be ascertained whether the general law would be suitable for succession to the property of *all* Hindu females. The result of this fresh inquiry is twofold. The opportunity was taken to revise the general proposition of law, and a separate line of devolution was enacted for the property of Marumakkattayi and Aliyasantana women.

The general law thus places the husband and descendants together, reverting to the proposition of the older Drafts of the "Code", so that the husband shares equally with a son or daughter. Next, somewhat strangely —seeing that the notion it represents is a strictly orthodox and archaic one—come the husband's heirs. Thus after her own children a wife might be succeeded not by her blood relations but by her husband's children by a previous wife. Next are placed her own parents; the father's heirs; and finally the mother's heirs. An attempt is made to mitigate the inconvenience of this order of devolution by bringing in exceptions which are plainly of a piece with traditional attitudes: where the property came from her

parents by succession it devolves not upon the husband ever, or his heirs, and so on, but simply upon the "heirs of the father". This is rather comical since if she has inherited a house from her mother, and dies without children or grandchildren of her own, the house must pass to her *father's* heirs, who, if her father is still alive, must of course be non-existent! The next exception is that property inherited by a woman from her husband or father-in-law must, if she leave no issue, devolve upon the heirs of the husband. The same comical difficulty obviously exists here also, but there is an additional complication where a woman marries twice: the property she may inherit from her first father-in-law may have to devolve on the heirs of her second husband, and the apparent intention of this well-intentioned but hastily drawn sub-section may be frustrated. Even the word "inherit" here is ambiguous.

In Section 17 the Act provides that the order of devolution of the property of a female Marumakkattayi or Aliyasantani shall be as follows (note that Thiyyas, etc., are to resort to the general law):—issue, and the issue of predeceased children by representation, take together with the *mother* (this is in general traditional): next the father *and* the husband take together: the heirs of the mother, the heirs of the father and lastly the heirs of the husband take in the order stated. The *second* of the two exceptions mentioned in the previous paragraph is applicable here also.

(*iii*) *Testamentary succession.*

516. Since the right of a Hindu to dispose of his property by testament was grudgingly admitted in the second half of the 18th century, and became only completely settled in the first quarter of this century, there have not ceased to be doubts in the minds of the profession that testamentary powers among Hindus are not

identical with testamentary powers among, for example, Christians domiciled in India. And this relates not to transfers of coparcenary interests which are possible with the consent of the coparcener or coparceners, nor to transfers to unborn persons since the right was conferred by statute, but to the right to create estates unknown to the Hindu law. Here the Privy Council and the High Courts have admitted transfers which do not appear to be warranted by the statutory authority conferred by the Indian Succession Act, and which seem to run counter to the general rule promulgated by the Privy Council in the famous *Tagore* v. *Tagore* case. That case laid down that estates in tail male could not be created by a Hindu subject to Hindu law, and on the strength of the *ratio*, or basic reasoning, of that case, numerous attempts to tie up property and prevent its passing to a numerous or general class of heirs have been foiled by the Courts. Capricious distinctions have been drawn particularly in connection with testamentary directions as to the succession to the office of manager of a religious foundation. The matter is a highly technical one, but at this stage it would have seemed best for Parliament to set all doubts at rest by declaring that the powers of disposition by will enjoyed by a Hindu are subject to stated exceptions no less than those of a person, other than one governed by Muhammadan law, subject to the Indian Succession Act, 1925. In fact the Act of 1956 carefully preserves in Sec. 30(1), the old uncertainties and anomalies.

517. The chief feature, as already noticed, of the Hindu's power of testamentary disposition at present is the reservation by the law of rights of maintenance, which cannot be defeated by Will. The Bill did not interfere with this, or any other provision relating to Wills. But it should be noticed that the Act made, in declaring the

rights of a Hindu (even a Mitakshara coparcener or a member of a Malabar joint family) to dispose of all his property by Will, a rather difficult reservation in favour of maintainees, until the provision was repealed in the Hindu Adoptions and Maintenance Act, 1956.

Sec. 30 (2) said something which was very different to the pre-1956 law on the subject. In the first place it reserved rights only in favour of heirs specified in the Schedule. Thus a widow or mother or daughter, *or even a son*, and equally a predeceased son's widow were accounted for. *Dasis* and illegitimate sons were ignored, no doubt to the satisfaction of reformers. But the nature of the rights was highly peculiar, being somewhat reminiscent of Family Protection as known in New Zealand, Australia and England. If one of these specified heirs (in other words *any* heirs *except* agnates and cognates as described in the Act) would have been an intestate heir, and the Will fails to give him the share to which he would have been entitled on intestacy, and he can prove that he is in need of maintenance or has an indefeasible right thereto under the current Hindu Law —for the precise meaning of the short-lived subsection will not be known until the Court pronounces upon it— he may obtain from the Court provision for his maintenance notwithstanding the terms of the Will, and the testamentary disposition will be altered accordingly.

12. *The result.*

518. The alterations in the law, when scrutinised, are seen to be guided by a desire to simplify and unify, but interfere with basic conceptions. Disqualifications are removed and in one case (murderer) somewhat strengthened : three whole chapters of the law (reunion, women's estate and the hermit) are abolished : tedious and outworn distinctions are removed : anachronous privileges are put an end to ;

and the competition of widow and issue is given careful attention. All these are improvements, as was the introduction of Family Protection. Cutting down the limits of heritable right would also have been a move in the right direction, since the State now looms so large in the individual's life. Yet the treatment of those now subject to the Cochin Thiyya Act, etc., is careless: the method of granting testamentary powers is awkward; the heirs in the preferential classes are oddly assorted, since some collaterals come in with ascendants, and representation of collaterals is not permitted; the total exclusion or postponement of *uterine* half-blood seems unreasonable, if traditional and the method of protection afforded to women by encouraging mutually jealous relations to leave them property by Will is not yet satisfactory. In some cases the Malabar system will be at an advantage and the distinction between the general law of succession to women and that applicable to Marumakkattayis, etc., suggests that Parliament may have been hasty in not making a substantial distinction in connexion with the Succession to males. The great interest in agnation in the general law is archaic without being orthodox.

An excellent innovation is that provided in Sec. 22, whereby the co-heirs have a right to buy out one of their number who proposes to give away or otherwise alienate his or her interest, and the protection for male heirs conferred in Sec. 23 whereby female heirs are prohibited from partitioning the family house of their mere volition, or from intruding their husbands or children into it.

519. In short the "reformers" have gone a long way to improve the present situation, but in some respects they have not gone far enough, while in others, such as the onslaught on the Malabar joint family (Sec. 7), they may have gone too far, and again in regard to the qualified

retention of the Mitakshara family Parliament seems to have been judicious but it remains to be seen how the complete scheme will work out.

13. *Matters omitted, and suggested improvements.*

520. A full critical commentary upon the Hindu Succession Act would take up as much space as the whole of this book. Nevertheless a word to the wise is enough, and the following remaks may prove useful to stimulate discussion, and possibly amendment.

i. Illegitimate children might be entirely affiliated to their mothers and their mothers' kindred, without harm of any kind.

ii. The Act adopts by implication the rules relating to domicile found in the Succession Act, 1925. These are for the most part the old English rules which have come under a heavy fire of criticism lately.[21] The upshot of the controversy is that a man's domicile for this purpose should be defined as his home, that he should not be able to have his domicile altered by anyone else after he reaches majority: that women should be inherently capable of having independent domiciles: that domiciles of origin should not revive when once an acquired domicile is lost and before a new one is acquired. Further examination of the matter reveals that the Indian Succession Act itself requires amendment.

iii. When giving the Government the right to take the property of those who die without heirs, the Government should be authorised to make payments out of an estate passing by *escheat* or as *bona vacentia* to persons whom the intestate might have wished to benefit.[22]

iv. A simultaneous death rule is given in Sec. 21, but it is not entirely satisfactory, since it is highly artificial, and has many inconveniences. The matter cannot be dealt with at length here,[23] but it is better that for some purposes on the one hand both should survive and that for other purposes on the other neither should survive.

v. Preference given to full blood, and the exclusion of uterines (Secc. 3(c)(ii), 8 and *Explanation* to the Schedule) at least in the early stages, seems to be a mistake, since the simpler view, taking degree of relationship as the chief factor, works no hardship, because it will be reciprocally enjoyed.

vi. It is worthy of reflection whether difference of religion ought to be a ground for exclusion from succession: cf. Sec. 26.

vii. There is no provision for hermaphrodites. In a system which insists upon a different order of devolution for males and for females those whose sex is indeterminate ought to be specially provided for. One might copy the provision already existing in Cochin and equate these people to females.[24]

viii. Provision for legitimation by subsequent marriage will be essential when the Hindu Marriage Act, 1955, has begun to produce situations where children are born to a couple that married under the age of marriage, or married within the sapindaship degrees and subsequently got their marriage registered under the Special Marriage Act, 1954. Legitimation by recognition might also be provided for the purpose of giving illegitimate recognised children a right to maintenance out of the estate, although the Hindu Adoptions and Maintenance Act, 1956, gives illegiti-

mate children a right to be maintained by their parents.

ix. Advancements made by an intestate to his children or grandchildren to set them up in life should be brought into hotchpot by them when he dies unless he releases them from that obligation. An ideal *propositus* will expect the intestate law to effect some equality between his issue. This hotchpot rule is in force in Common Law and Civil Law countries, but curiously enough, has never been in force in India. Conditions in India cannot be so radically different to those in other countries, and, although the Israeli Succession Bill omits the rule, that system envisages a very comprehensive maintenance law. In India collation of marriage expenses by daughters might well be excused, but not their dowries.

x. Finally certain tidying-up, as it were, is required, as explained in Sec. 515 above: in regard to the inconsistency between Sec. 30(1) *expl.* and the proviso to Sec. 6: and the rights of adopted sons in the estates of those who died between the 17th June, 1956 and the 21st December, 1956 must be secured.

CHAPTER X

CONCLUSIONS

1. *What appearance will the reformed Hindu law present?*

521. No one is going to prophesy with any confidence what will be the results of codifying the Hindu law in the way which is at present substantially effected. A few reasonable conjectures may be hazarded, but they may be read only as conjectures, certainly not prophecies or promises. But as to the appearance which the law, from its formal aspect, will give to the student, it is possible to say something rather more definite. For this purpose, of course, it will be assumed that the Joint Family Part of the "Hindu Code Bill" will be passed into law in approximately the same shape as that which it now displays. Not even the most ardent "reformer" would contend that it has any chance of being passed by Parliament *exactly* in its present shape, and it is quite possible that it may not be passed at all, the joint family being allowed to wither away.

522. What then will be the superficial effect of the new "Code"? At once we shall see that Hindu law will continue to draw its inspiration from divergent sources. The fundamental source of the Hindu law will not be the Code alone, though that will, of course, be the source most frequently resorted to. The reason for this is the fact that the Code deliberately (and no doubt rightly) leaves room for customs in certain regards, particularly Marriage, Adoption and Succession, while in numerous instances the law set out in the Code cannot be adminis-

tered entirely without reference to the law existing at the moment of codification. Thus the mixed background and muddled origins of the present Anglo-Hindu law will not be entirely dispensed with, though they will obtrude themselves for practical purposes to a distinctly subordinate degree.

523. Then the content of the Code itself will be a unique mixture of the traditional and the modern. Much of the new law will be applied by the Courts for the first time. The law of nullity and divorce, the law of Family Protection, and the new law of preemption by co-heirs of a Hindu are examples of a chapter of the law of which Indian judges have small experience, and, as is the practice in other branches of Indian law, it is likely that they will turn to existing Indian, English or American precedents in order to support the decisions which they feel it appropriate to give. This will let in something far more incongruous than Justice, Equity and Good Conscience, for whereas the latter, as at present conceived of (see sec. 24 above), consorts harmoniously with the basic spirit of certain chapters of the Hindu law where apparent or actual gaps have let in that residual source of law, the Courts in interpreting a statute, if their approach is correct, will concern themselves with the best manner of applying the words of the Act, and their effort of construction is a distinct type of effort from that which seeks to prolong a body of quasi-common law, such as was the Anglo-Hindu law. We have examples of various curious interpretations of the Hindu Women's Rights to Property Act, an Act difficult to construe if ever there was one, and we have witnessed the anxiety that judges have experienced in endeavouring to construe the Act so as not to make an unduly large breach in the Anglo-Hindu law which it amended.[1] This desire cannot be present in the

construction of the Code, for there is no ground for supposing that any substantial part of the Anglo-Hindu law will survive, and we must assume that its spirit (such as it was) is destroyed by the very project of codification and reform.

524. The result is bound to be the elimination gradually of that esoteric and complicated technique of administering Hindu law which is hardly adequately describable in terms of anything other than a *mystery*. Hindu law will come down out of the clouds and will take on the guise of a statutory law similar to the law of Contract or Evidence. This cannot but be beneficial in the long run. The last lap of the journey towards the Indian Civil Code looms very much nearer—which is just what was intended.

525. As soon as the ice is broken, and the *mystery* is dispelled, people will begin to ask, why are Hindu marriages different from marriages under the Special Marriage Act or the Indian Christian Marriage Act? Why do we not have an Indian Marriage Act? What justification is there for retaining the fragments of archaic law in Succession and Adoption? Why do we not remove the last traces, and let the religiously-inclined manage other-worldly things independently? Let Adoption be placed upon a rational footing, so that those persons benefit from the institution who should naturally benefit, without reference to religion. Such remarks are much more cogent after the passing of the Code, and the Code as the only authoritative statement of the Hindu law has nowhere to look to for support.

526. For the sad fact is that, although the Code will have served its turn in bringing the children of Bharata out of the wilderness, rescuing them from the distressing condition of the Anglo-Hindu law of yesterday it will,

when once they have taken it for granted, give them little satisfaction. It is not an intellectual whole, it is not founded upon clear principles or rational doctrines. It is hardly a typical Anglo-Indian Code: rather it is more like an English codification than some of the more splendid Indian Codes such as the Penal Code. Practice and experience will soon demonstrate whether it is a mighty banyan tree sending down its roots into a variety of soils, or whether it is a lifeless creature unable to progress because it is equipped with every means of propulsion, operating simultaneously in different directions and without steering-gear.

527. Someone might ask whether it will be approved by the outside world. Such a question need not surprise the reader, since it is one which, though most often unspoken, is generally seldom far from the minds of reformers in India to-day. The recently-won independence of action, which has so creditably inspired her citizens, still enables many intelligent servants of India to retain a cautious desire to merit the commendation of unprejudiced observers. If advanced countries admire, the Indian inventor is doubly pleased. Since advance of any kind is displeasing to the "orthodox", who fear that movement in any direction is inspired by either evil or indifferent motives, and since the "orthodox" are still a force to be reckoned with not least because their strength is largely moral, innovations in India, without foreign encouragement, often seem unduly precarious to their makers.

528. Unfortunately the foreigner unacquainted with the Hindu way of life is in a position to wonder, but hardly to decide. He may praise the determination to tidy up the mess that existed previously, or he may emphasise the magnitude of the breaches with the past. But those

jurists who are accustomed to peruse new Codes, particularly in the Civil Law *milieu* of the continent of Europe and Latin America and also to a considerable extent in the United States, will undoubtedly find immense intellectual interest in the projected Hindu Code. It will be unique, and its appearance will at once mark it out from among all the other codifications of family law. The blend of archaic and modern, the tenacity of the "reformers" to features which cannot be explained without reference to the *dharmashastra* (which now disappears behind the scenes), their willingness to adopt remedies from outside the Hindu tradition and their determination to simplify, to organise and to unify will undoubtedly arouse admiration. But when the critic enquires, for example, why guardianship is not to remain largely a private responsibility, why the Court must sanction important alienations by a natural guardian, while on the other hand private individuals retain their rights of breaking up joint families at will, irrespective of the rights of minors or lunatics, retain also their rights of supervising marriages without the parties' general recourse to the Court, adopt and give in adoption (except in the case of adoption of orphans) without the intervention of the State, and take inheritances without letters of administration or judicial process, the question why organisation has gone so far and yet not further will not achieve a completely satisfactory answer. For it is evident that Parliament has not legislated so far with the interests of the poor and illiterate citizens (*i.e.* the majority) in mind.

As I have said, the history and origins of the project we have before us have produced an example of something less perfect than a typical Anglo-Indian Code and something more nearly resembling an English statute such as the Matrimonial Causes Act. Intellectual satisfaction.

consistency or genuine inspiration can hardly be expected from such a source.

2. *How far will it be a deviation from the shastric law?*

529. A generalised answer to this question is extremely difficult to frame, and would be unwise to trust. In the first place it must be reemphasised that *shastra* in this context does not mean Manu or Yajnavalkya. It does not mean the Veda. Nor does it mean the *Mitakshara* or the *Dayabhaga* or the *Dattaka-mimamsa*. It means current authority on *dharmashastra* problems, which will differ in some respects radically from the views of individual mediaeval commentators, however eminent, and may often have little or no relation to individual texts of *smriti*.

530. The Code, if passed approximately as it stands, will be a direct descendant of the *shastra* only in the sense that no one can understand it without reference to the history of the Hindu law. From *shastric* texts, and from general *shastric* sources, much material may be culled which will explain features in the Code.

531. But it would be misleading to say that the Code is based upon the *shastra*. Indeed it departs radically at every significant turn from the *shastric* technical standpoint, while the remainder of the Code is indifferent or immaterial from that standpoint. Of course, as has been indicated in previous chapters, much of the *shastric* law on individual chapters is not of great ethical importance. Where the "reformers" have had tender consciences towards the *shastra*, and have retained antique or primitive features they might have spared their pains, for the *shastric* texts are there mechanical, accidental or non-essential. It does not matter to the *shastri*, for example, whether or not the brother's son excludes the sister's son:

both can give *pindas,* if one accepts that that is a crucial matter. Even agnation and patriliny, towards which the "reformers" have shown the popular prejudice in the North of India and the East, was broken into violently by every ancient jurist who brought an original approach to the subject. All the achievements have been to *destroy* agnation, not to protect it. The pathetic mention of *saptapadi* is almost useless and actually confusing from the legal standpoint: it gives an "orthodox" flavour to the chapter, and is in that respect a mere fraud. For the Marriage Act, no less than the Adoptions and Maintenance Act, makes a violent breach with the developed and contemporary *shastra,* and such references add insult to injury. The need for such hypocrisy in a democracy, where members of Parliament have to be persuaded that a measure is something different from what they imagine it to be, is alone the cause of such rather discreditable, if practical, devices. Fortunately the same complaint cannot be levelled at the Succession Act, which is frankly innovative.

532. Marriage, Adoption and Succession: these three depart from the *shastra* radically, though they do not, except in regard to sections of the community, *e.g.* in Malabar, as was stated above, do any positive and inevitable harm thereby. Maintenance, Guardianship and Joint Family retain the *shastric* background more or less undamaged.

533. Would it be true to say that the Code represents a natural progression from our present or recent position, and that it is a normal development from the last effective *shastric* periods (roughly prior to the nineteenth century) through the hey-day of the Anglo-Hindu law onwards into the contemporary social scene? Would it be correct to say that, ignoring the departures from the *shastra* (which are

only a part of the picture), such codification is inevitable in our day, and that no other sort of reaction could be anticipated? The answer to all these questions is, in the main—yes. Having regard to the conditions which prevail, and natural prejudices, the most that can be required is that the Drafts should be suitably amended and corrected, and that the result should be consolidated without undue delay.

3. *What effects may be expected as a result of the codification?*

534. No one can prophesy with any confidence what effects upon Hindu social life the codification will have. But the following guesses may be somewhat near the truth, provided the judges interpret the statutes as Parliament evidently expected them to do—a rather large assumption. In the first place the present tendency to later marriages will not be checked, and the gradual progression towards the earlier partitioning of ancestral property will continue. Caste prejudices will tend to decrease, since the gradual raising of the age of marriage will give opportunities for more love matches, which are a powerful solvent of caste-exclusiveness. Greater unity of customs between castes will begin to be felt and the rather distasteful litigations which use to disgrace the Indian courts on caste issues, such as whether such a community were really Shudras or Vaishyas as they claimed to be, will be entirely obviated and such consciousness will disappear, as it will have no practical effect in the realm of private law. Castes which are still allowed special privileges, as of divorce by mutual consent, will voluntarily give them up, and in course of time the unification of Hindu communities will advance still further. A century or so will find children ignorant of the purpose of the

institution of caste. No one will deny that this will be of assistance to India's progress in fields of real moment, whatever losses the metaphysicians may mourn.

535. So far as may be conjectured at the time of writing, the Code will hasten, or at least facilitate, the eventual disappearance of the *legal* Hindu joint family. At their own pace communities will repeatedly adopt measures which will eliminate the incidents of joint family tenure. The Hindu Succession Act has been more severe on the Marumakkattayam and Aliyasantana families than the Mitakshara family, but it is plain from Sec. 19 that unless heirs voluntarily throw their joint inheritance into an old-fashioned 'joint family hotchpot' the very inception of new Mitakshara coparcenaries will be prevented. Whatever its disadvantages, this step will certainly encourage independence and initiative among the young, not without great advantage to India.

536. Hindus will begin to wonder why they have a special family law and will urge non-Hindus to join them in a Civil Code. They will forget that there was an historical justification for the oddities that will be found in the Hindu Code, and will readily accept further adjustments of a rationalistic type, such as at present are too much for most Hindus to swallow. The total abolition of personal laws will become a reality, which may not be achieved within the lifetime of anyone now living, but which cannot be long delayed thereafter.

537. There can be no doubt but that greater legal freedom for women will soon produce a variety of results. At first sisters and daughters will easily be persuaded to release their rights. Compulsory purchases of their shares will at first assuage the jealousy of their male competitors. But when it begins to be seen, as is well-known in some other Eastern countries, such as Burma and Ceylon, that

the economic freedom of the woman, and her exemption from compulsory or unduly early marriage, may actually enrich social and artistic life, a revolution in habits and manners, in the style of living and its very standards will come about. Those who are now content to live in conditions bordering upon the primitive and who praise themselves for their abstinence and simplicity by reference to 'philosophy' and the vanity of worldly things, will view graces and finesse with a new eye and will see a significance and value in features which they now believe to appertain to the luxury of those corrupt places, cities. When women feel their feet, and are no longer afraid to abandon that survival from a by-gone age, *stri-dharma,* according to which the female must worship the male as a god—a doctrine upon the objective truth of which most Hindu males complacently show a unique harmony—in all likelihood their new self-confidence will enrich rather than impoverish their families, and the fuller part played by both sexes in social life will alter conventional attitudes not only of men to one another, to their township or village and to their country, but of the whole public to the Indian civilisation, and the present attitude which so often mixes complacency with self-criticism will give way to practical and energetic constructive thought and action. Eating habits will change, when women are no longer willing to spend all their lives in the kitchen. More meat will be eaten, in order that a diet which takes so long to prepare and requires such skill to concoct, need no longer reign upon the Indian table. The invigorating effects of this alone it may be difficult to imagine against the present background.

538. The imagination may wander idly but pleasurably over the possible results of the Code, its thorns extracted and its gaps filled. Once the old prejudices are

admitted to have given way—whereas now pretence unnaturally outlives reality—unlimited progress lies open to those who are now as much bound by their social philosophy as by their family law.

APPENDIX I

NOTES AND REFERENCES

In a work of a semi-popular character, intended rather for rapid reading than for reference, it would be unduly cumbersome to give a reference for every statement which was not a matter of opinion on the writer's part. I have therefore abstained from giving a reference where I knew that such a statement could be readily verified in a standard work listed in the Select Bibliography which appears below. Since Hindu law moves unevenly and at times jerkily and rapidly no text-book is ever quite up-to-date, and therefore some more or less recent references had to be given here. Again a particular point of view of my own may not be easily checked with the aid of works listed in the Bibliography, and I have thus referred to some cases which no doubt will be found referred to in most text-books, but not perhaps for the same purpose or in the same order.

Chapter I

1. It has insisted upon doing so in, for example, *Gurunath* v. *Kamalabai*, A.I.R. 1955 S.C. 206, despite the very cogent arguments in G. B. Dabke's article in (1952) 55 Bombay L.R. (Journal) 57 and ff; it has refused to do so in *Shrinivas Krishnarao* v. *Narayan Devji*, A.I.R. 1954 S.C. 379, despite the arguments in *Some Troublesome Cases in Adoption*, (1953) 55 Bom. L.R. (Journal) 1 and ff.
2. Justice Umamaheswaram in *Dodda Subbareddi* v. *Gunturu Govindareddi*, A.I.R. 1955 Andhra 49; a

different view had been taken in *Punjabi* v. *Shamrao,* A.I.R. 1955 Nagpur 293.

3. In *Hutcha Thimmegowda* v. *Dyavamma,* A.I.R. 1954 Mysore 93 (F.B.).

4. As in *Annagouda* v. *Court of Wards* [1952] I Madras L.J. 414 (S.C.), and *Arunachala Mudaliar* v. *Muruganatha,* A.I.R. 1953 S.C. 495.

5. As, for example, in *Basappa* v. *Parvatamma,* A.I.R. 1952 Hyderabad 99 (F.B.); *Gajanan* v. *Pandurang,* A.I.R. 1950 Bombay 178 (F.B.); *Ben Madhu* v. *Bai Mahakore,* A.I.R. 1950 Bombay 66; *Neelamma* v. *Perumal Pillai,* A.I.R. 1953 Trav.-Cochin 518 (F.B.); and *Ganga Baksh Singh* v. *Madho Singh,* A.I.R. 1955 Allahabad 288 (F.B.). The harm that was done by the anomalous decision in *Radhi Bewa* v. *Bhagwan Sahu,* A.I.R. 1951 Orissa 378 (S.B.) was apologised for in the overruling decision in *Moni Dei* v. *Hadibandhu Patra,* A.I.R. 1955 Orissa 73 (F.B.).

6. The Hindu Law of Inheritance (Amendment) Act, 1929, produced a different result in Bombay to that produced elsewhere (the position of the sister) until the aberration was cured by an appropriate Bombay decision; Bengal amongst a few States having failed to extend the provisions of the Hindu Women's Rights to Property Act, 1937, to agricultural land, that property devolves as if the Act had never been passed: see *Brindaban Singha* v. *Chandubala Debi,* A.I.R. 1955 N.U.C. 831 (Calcutta), and cf. the situation in Madras where the same was the case for several years, the effects being felt even now: *Dhanam* v. *Varadarajan,* A.I.R. 1953 Madras 176.

7. Mysore, Baroda, Travancore and Cochin are the most important examples.

8. For example, the right to marry a maternal uncle's daughter or to adopt a sister's son in Madras. See Kane, *Hist. of Dharmasastra,* II, 458 & ff., and A.I.R. 1955 Madras 559.
9. *The Collector of Madura* v. *Mootoo Ramalinga Sethupathy,* (1868) 12 Moore's I.A. 397, 436.
10. See *Waghela* v. *Sheikh Masludin,* (1887) L.R. 14 I.A. 89. Common Law and not statute law: so Justice Chagla (as he then was) in *Philomena* v. *Dara Nussarwanji,* I.L.R. [1943] Bombay 428 ; Common Law read with statute law: so Chief Justice Stone in *Secretary of State for India* v. *Mst. Rukhminibai,* A.I.R. 1937 Nagpur 354, 367-8. See the discussion in *Sadu Ganaji* v. *Shankerrao D. Deshmukh,* A.I.R. 1955 Nagpur 84. An interesting evaluation of the scope of this source of law in controlling judge-made Hindu law may be found in *Natvarlai Punjabhai* v. *Dadubhai,* (1953) 56 Bom. L.R. 447, 456, 458=A.I.R. 1954, S.C. 61 ; (1954) 17 S.C.J. 34.
11. The best example is Jimutavahana's rule regarding alienations by the father of ancestral property, but there are more examples of this distinction than is commonly believed, including references in the text of the *Mitakshara.* One may refer to the discussion in the *Sarasvati-Vilasa,* Mysore edn., 277-283. See also an article entitled *Prohibition and Nullity* in the Sir Ralph Turner Presentation Volume, for the views of Sankarabhatta on this subject.
12. An assessment of the true dependence of the law from Vedic sources can only be arrived at from a comparison of the views of Kane, Sen-Gupta and Mazzarella.
13. Three recent cases demonstrate this: *A.* v. *B.,* (1952) 54 Bom. L. R. 725 ; *Deivani Achi* v. *Chidambaram*

Chettiar, A.I.R. 1954 Madras 657 ; *M. Nagendramma* v. *M. Ramakotayya,* A.I.R. 1954 Madras 713.

14. In *The Collector of Madura* (above). See *Debiprasanna* v. *Harendra,* I.L.R. (1910) 37 Calcutta 867. It would have been very satisfactory if the Privy Council had followed its own rule, but it has occasionally overruled its own chosen authorities, as for example the Mayukha in *Bai Kesserbhai* I.L.R. (1906) 30 Bombay 431 (P.C.).
15. The strangest misunderstanding was that traceable in *Kenchava* v. *Girimallappa,* (1924) L.R. 51 I.A. 368, followed in *Adiveppa* v. *Veerbhadrappa,* A.I.R. 1948 Bombay, 111, to the effect that the Hindu law did not exclude the murderer from succession to the murdered person. See 2 *Norton* 440 and 1 *Strange* 157-160. See below Note 17 to Chapter IX.
16. For example, *Mayna Bai* v. *Uttaram,* (1864) 2 Madras H.C.R. 196.
17. This would appear to be outside limit of such application: *Iravi Pillai Paramesvaran* v. *Mathevan Pillai Ramkrishnan,* A.I.R. 1955 Trav.-Cochin 55 (F.B.).
18. In *Chapman* v. *Chapman,* [1954] 2 W.L.R. 723, 750 (H.L.).
19. Hindu Law of Inheritance (Amendment) Act, 1929, s. 3 (a).
20. See D. Lloyd, *Codifying English Law,* Current Legal Problems, 1949, p. 155 and ff.
21. A very moderate and intelligent work from the orthodox standpoint is that of V. V. Deshpande, *Dharmasastra and the proposed Hindu Code,* Benares, 1943 ; a less scholarly approach is that of Narendranath Set, *Third Hindu Code,* Calcutta, 1944. The reader may be directed to articles in the Silver Jubilee Number of the Madras Law Journal, 1941. The best

and most readable account of the orthodox case is given in Rangaswami Aiyangar's *Some Aspects of the Hindu View of Life according to the Dharmashastra,* Baroda, 1952.

22. Writers demanding an Indian Civil Code, as for example Justice Bhagwati in his Foreword to Paruck's *Indian Succession Act*; B. N. Chobe; and K. Venkoba Rao in 55 Bom.L.R. (Journal) 47 and ff., are almost exclusively Hindus. See also the characteristic minute of dissent by K. B. Lall to the Report of the Select Committee on the Hindu Adoptions and Maintenance Bill (presented 19 Nov., 1956) in C.S. No. 12, Rajya Sabha Secretariat, November, 1956, pp. v-vi.

23. I am indebted to Sir Cowasji Jehangir for kindly procuring me an authoritative opinion on this question. As for Indian Muslims, there can be no doubt but that they might reasonably consider adopting some of the reforms of the Islamic law that have been accepted in most Middle Eastern countries in one form or another. For information on this one may consult the work of Professor J. N. D. Anderson, which describes the reforms and the methods by which orthodox opinion has been won over to quite radical changes in the following series of articles; *The Muslim World*, October 1950-October 1952, nine articles entitled *Recent Developments in Shari'a Law*; also *The personal law of the Druze community* in The World of Islam, vol. II, nos. 1 and 2, 1952; *Recent Developments in Shari'a Law in the Sudan,* in Sudan Notes and Records, vol. 31, 1950; *The Problem of Divorce in the Shari'a Law of Islam,* in Journal of the Royal Central Asian Society, 1950; and *The Syrian Law of Personal Status*, Bulletin of the S.O.A.S., 1955.

CHAPTER II.

1. See his introduction to *Hindu Law in its Sources.*
2. Many are listed in *Criteria for Distinguishing between Legal and Religious Commands in the Dharmasastra,* A.I.R. 1953 Journal 52 at 61 n. 18 ; to which should be added Annual Report of Epigraphy, Madras, for 1919, Nos. 429 and 538 of 1918.
3. It is an error to assume that *all smriti* rules were derived from custom or that if they had been so derived there would have been no technical opposition to abandoning them. Here some of the "Code's" partisans have been misled by a passage of Mitra Mishra which really is of no help to them.
4. As for example in *State of Bombay* v. *Narasu Appa Mali,* (1951) 53 Bom.L.R. 779 ; *Sardar Syedna Taher Saifuddin* v. *Tyebbhai Moosaji Koicha,* (1952) 55 Bom.L.R. 1; *Ratilal* v. *Bombay State,* (1952) 55 Bom.L.R. 86 and (on appeal) (1954) 56 Bom.L.R. 1184 (S.C.) ; and *Commissioners of Hindu Religious Endowments* v. *Sirur Mutt,* [1954] I M.L.J. 598 (S. C.).
5. See *Religion and Law in Hindu Jurisprudence,* A.I.R. 1954 Journal 79 and ff.
6. A good example, taken from the *Shramaneratika* of Jayarakshita, is recorded by Professor Altekar in *Sanskrit Literature in Tibet* (1954) 35 AB.O.R.I. 63.
7. A case "in real life" where just such a feeling was felt and expressed is recorded by Lakshmibai Tilak in her autobiography, *I follow after.*
8. For example the right of parents to sacrifice the fifth child to a river-goddess, a practice stopped not without great difficulty in 19th century Bengal.
9. *State of Bombay* v. *Narasu Appa Mali,* (1951) 53

Bom.L.R. 779; *Chennamma* v. *Dyana Setty,* A.I.R. 1953 Mysore 136.

10. For information on the family law applicable to Hindus domiciled in Ceylon see H. W. Tambiah, *The Laws and Customs of the Tamils of Jaffna,* 1950, and *The Laws and Customs of the Tamils of Ceylon,* 1954.

CHAPTER III.

1. The problems in Islamic Law contrast sharply with those experienced in connection with Hindu Law. See Anderson, articles referred to in Note 23 to Chapter I above. Selection of various rules from various authorities would be useless since there are no really independent "schools", no authorities are really binding to-day, and selection upon any plan would be a virtual rewriting of the *shastra.*
2. See his *Principles of Dharmashastr* (sic), Hyderabad (Dn.), (?) 1949, a work upon individual statements in which implicit reliance should not be placed.
3. *Upanayana,* the initiatory ritual by which boys of the twice-born classes (*i.e.* other than Shudras) commence their Vedic education. The ceremony is generally performed about the age of ten or eleven and nowadays the education referred to is merely nominal. This is the "second birth", and from the point of view of availability for adoption there is some traditional significance in the question as to the family in which it is performed.
4. This is a relic of the old Special Marriage Act and was hotly contested by many members of the Joint Committee (see their *Report* published March 1954). Only the prejudice felt in some quarters against the

Joint Family could justify it under modern, as contrasted with late 19th century conditions.

5. Expressed in the *Shukraniti*, a work of perhaps the 14th or 15th century.
6. An example of the difficulties is provided by *Dashrath Prasad* v. *Lallosing*, A.I.R. 1951 Nagpur 343 and several later Nagpur decisions.
7. This begs a historical question, but no doubt the courts will concern themselves as little as possible with historical and theological controversies. They have managed up to now to lend a very deaf ear to the protests of the Lingayat community.
8. Chinese Buddhists or Confucianists are examples of the classes who are intended to be excluded. The Chinese Buddhists in Burma have strangely treated: at first allowed to follow the Chinese customary law they have, after some distressing judicial vicissitudes, been held to be subject to Burmese Buddhist law. Such a history should be avoided in India. They are at present subject to the Indian Succession Act, since no allowance in favour of Chinese customary law appears to have been made in Indian law. The position of the Jews is similar, though on the Ecclesiastical side of the Bombay High Court Jewish marriage laws have been applied.
9. See G. W. Bartholomew, *Private Interpersonal Law*, in International and Comparative Law Quarterly for July 1952.
10. At present it seems rather easier to be re-converted or to "relapse" than to be converted: see *Mrs. A. Marthamma* v. *A. Munuswamy*, A.I.R. 1951 Madras 888, compared with *Gurusami Nadar* v. *Irulappa Konar*, A.I.R. 1934 Madras 630, and *Ramaya* v. *Jose-*

phine Elizabeth, A.I.R. 1937 Madras 173, but the problem is an embarrassing one, of which India will be happy to rid herself permanently.

CHAPTER IV.

1. The definition given in *Rayden on Divorce* (6th edn., p. 54) is really no definition at all. It runs as follows: "Marriage is a fulfilment of a contract satisfied by the solemnisation of the marriage, but marriage, directly it exists, creates by law a relation between the parties and what is called a status of each: the status of an individual, used as a legal term, means the legal position of the individual, in or with regard to the rest of the community: that relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage, are not imposed or defined by contract or agreement but by law". We are referred to *Niboyet* v. *Niboyet,* (1878) 4 P.D. 1, 11.
2. Of the seven sorts of *punarbhu* mentioned by Baudhayana only two survived according to the *shastra,* the girl whose first marriage was not consummated, and one whose bridegroom died after the preliminaries were completed but before *saptapadi.* The latter type is a stricter definition, and some authorities would not allow a man to marry one who belonged to the former class.
3. A discussion of the matter is to be found at length in *A.* v. *B.,* (1952) 54 Bom.L.R. 725=I.L.R. [1953], Bombay 487 ; with this should be compared the exactly similar case in England of *D.* v. *D.* [1954] 2 All E. R. 598 ; (*sub nomine B.* v. *B.*) 1954 3 W.L.R. 237. See also *Nullity in the Hindu*

Law of Marriage, 54 Bom. L.R. (Journal) 115 and ff., which should be supplemented with J. H. Dave, *Grihastha Prakasha of Prithwichandra on Nullity of Marriage*, 55 Bom.L.R. (Journal) 25 and ff., and *Smritichandrika* (Gharpure's edn., 1918, p. 83) where Devanabhatta clearly says that texts which enable a woman to take a second husband after the *yoni-samskara* had been performed but while virginity was still intact relate only to previous ages. This text was not quoted in *A.* v. *B.*, because of the demands of advocacy. Mention should be made of the orthodox, though less elaborate, judgment in *Kantilal* v. *Vimla*, A.I.R. 1952 Saurashtra 44, where nullity was refused; to *Ratan Moni Debi* v. *Nagendra Narain Singh*, I.L.R. [1945] I Calcutta 407, where nullity was granted on grounds differing from those worked out in *A.* v. *B.* and to *K. Malla Reddy* v. *K. Subamma*, [1956] An. W.R. 590; A.I.R. 1956 Andhra 237, where the subject is carefully renewed and the weakness of the texts is more than hinted at.

4. There has been a regrettable misunderstanding on this subject. The courts of British India abandoned the qualification for entering into a second marriage, while the courts of the former French India correctly maintained the *shastric* law, subject to this amendment that the consent of the senior wife operates as a complete licence to the husband to marry again. I have not come across a suit for the *adhivedanika* or supersession-fee (see Sec. 138 below) which is due to the first wife, but what inference is to be drawn from this it is difficult to determine. Most likely husbands marrying again have secured their first wife's comfort; though suits for maintenance in such circumstances by senior wives were not

extremely rare. Perhaps the *adhivedanika* is obsolete, though no court seems to have declared it so.

5. The suggestion of one digest-writer of the later middle ages that non-virgins might be validly given in the *samskara* form of marriage provided the contract was in one of the "unapproved" forms (commencing with Asura) has not been taken up seriously by later jurists generally.
6. The whole subject is dealt with by Purushottama-pandita in the *Gotra-pravara-manjari,* ed. Brough, Cambridge, 1953.
7. This strongly resembles the extension of the law of affinity as administered by the Prerogative Courts of 16th century England. The scope of affinity is now much reduced by statute. It may be noted that in England a divorced but living wife's sister cannot be married though a deceased wife's sister can. This distinction is not observed under the Hindu Marriage Act, 1955.
8. See references given in note 3 above.
9. *Deivanai Achi* v. *Chidambaram Chettiar,* A.I.R. 1954 Madras 657.
10. By the Acts listed in the last Section of the Hindu Marriage Act 1955, q.v.
11. For example Mysore, Travancore and Gwalior.
12. Because of the Federal Court decision in *Ratneshwari* v. *Bhagwati,* I.L.R. [1942] Allahabad 518 ; on appeal in A.I.R. 1950 F.C. 142.
13. See *Dubey* v. *Dubey,* A.I.R. 1951 Allahabad 530 (Indian Christian Marriage Act) and *Rajammal* v. *Mariyammal,* A.I.R. 1954 Mysore 38, (see also I.L.R. 33 Madras 342) for Hindu-Christian marriages.
14. See note 9 above.

15. A certain degree of doubt is introduced by the decision in *Santosh Kumari* v. *Chimanlal,* (1949) 52 Bom.L.R. 394, (where the Special Bench decision in *Ganeshprasad* v. *Damayanti,* [1946] Nag. 1, was not followed) that a violation of one of the "conditions" laid down in Sec. 2 of the Special Marriage Act, 1872, rendered the marriage void.
16. This is borrowed from English law: see Matrimonial Causes Act, 1950, Sec. 8.
17. The more humane (but technically less sound) view was taken by Madras (*Musunuru Nagendramma* v. *M. Ramakotayya,* A.I.R. 1954 Madras 713) and Orissa (*Kulamani Hota* v. *Parbati Debi,* A.I.R. 1955 Orissa 77) and the opposite view by Nagpur (*Sukhribai* v. *Pohkalsingh,* A.I.R. 1950 Nagpur 33) and (on the wording of Act XIX of 1946) Bombay (*Laxmibhai* v. *Wamanrao,* A.I.R. 1953 Bombay 342). Bombay did not normally adopt so inhumane an approach, as is seen from *Mallawa* v. *Siddhappa,* A.I.R. 1950 Bombay 112 (husband was cruel in bringing a concubine into the house).
18. See cases referred to in note 17 above, and *Palaniswami Gounder* v. *Devanai Ammal,* A.I.R. 1956 Madras 337 (F.B.).
19. And thus the statement of Sir H. S. Gour that "legal cruelty" has the same meaning as in English Divorce practice remains unproved.
20. This provision, in Sec. 9 (2) of the Act is entirely novel and not borrowed from English law.
21. A detailed discussion of legitimacy in the Hindu law with reference to the *shastra* and the latest decided cases is to be seen in *Inheritance by, from and through illegitimates at Hindu law,* (1955) 57 Bom. L.R. (Journal) 1-22, 25-39 and, in reply to *Sadu Ganaji* v.

Shankerrao, A.I.R. 1955 Nagpur 84, *More about illegitimacy at Hindu law*, (1955) 57 Bom. L.R. (journal), 89-98. See also *Kamalakara on illegitimates* (1956) 58 Bom. L.R. (journal), 177-87.

22. The old system called *niyoga*, which is likened to the levirate, by which a man could be authorised to cohabit with a wife or widow in order to provide an heir for her husband.
23. Canon 1118 (Codex iuris canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, edn. 1951).
24. Historically speaking divorce in England has grown from the opinion that *divorcium a mensa et thoro* was as good as a *divorcium a vinculo*—a view ratified by statute in the middle of the 19th century.
25. The rule, which is of great antiquity in England, and is found set out in Sec. 4 of the Matrimonial Causes Act, 1950, derives from the old notion that the Church courts would not grant relief to a petitioner whose petition was tainted by hypocrisy or whose own matrimonial offences might have driven the respondent to commit the offence complained of. Divorce was thus looked upon as a favour conferred upon the petitioner, not as an expedient for the benefit of society at large. Hindu law in ancient times allowed a spouse to be repudiated for a matrimonial fault, but there was no question of faults on the other side being considered relevant in mitigation. The Baroda Hindu Act, Sec. 119, has retained some vestige of the English rule, but the provisions of the Hindu Marriage Act, Sec. 23 (1) (a) are probably directed to a different end, e.g. a spouse cannot sue for relief upon grounds which he himself created or suffers from. Here again the English law differs,

since a lunatic may sue for nullity on the grounds of his own insanity: *Rayden on Divorce*, p. 63.

26. The *eka-shariratva* of spouses is a classical theory upon which judges in our day were rather fond of relying. Amongst the numerous examples which appear in modern reports the following are among the most interesting: *Venkatiah* v. *Kalyanamma*, A.I.R. 1953 Mysore 92 (F.B.); *Subba Rao* v. *Krishna Prasadam*, [1953] II M.L.J. 561; *Rama Appa* v. *Sakhu Dattu*, (1953) 56 Bom.L.R. 227.

27. The process is regulated by Secs 15 to 18 and Sec. 28 of the Special Marriage Act of 1954.

28. Sec. 21 (1) (c).

29. See Sec. 30. Grounds for divorce under Sec. 148 of the Hindu Act, 1937, are briefly:—disappearance for 7 years; becoming a recluse; conversion to another religion; cruelty: desertion for more than three years after cohabitation commenced; addiction to intoxicants for more than three years so as not to fulfil marital obligations; adultery (even once); bigamy. A wife has additional grounds: impotence from marriage to time of suit; *habitually* committing an unnatural offence: not allowing the wife to stay with him for more than three years. Husband has additional grounds: pregnancy by another; not staying with him for more than three years.
Sec. 150 prescribes damages against a co-defendant.

30. The oddity, which is logically indefensible, is found in the English Matrimonial Causes Act, 1950, Sec. 16, whence it found its way into the Hindu Marriage Act. See *Thomson* v. *Thompson* [1956] 1 All E. R. 603.

31. Found in the English law: Matrimonial Causes Act, 1950, Sec. 2 (1) (2).

32. The corresponding rule is found in the English statute, but conditions of life in India are admittedly somewhat different. The Baroda Act (see note 29 above) properly insists that the practices should be habitual. As for lesbianism, etc., see *Gardner* v. *Gardner* [1947] 1 All E.R. 630; *D.* v. *D.* [1952] 2 All E.R. 854 (C.A.) and *Spicer* v. *Spicer* [1954] 3 All E.R. 208.

33. No similar provision is found in the English law: see Matrimonial Causes Act, 1950, Sec. 13.

Chapter V

1. Andhra thinks *shulka* obsolete, not so Travancore-Cochin: *Venkata Reddy* v. *K. S. Reddi*, A.I.R. 1955 Andhra 31 (cf. *Balakrishnayya*, A.I.R. 1941 Madras 618); *Arunachalam Subbian* v. *Sivakami Kolamma*, A.I.R. 1955 N.U.C. 1659 (T.-C.).

2. One should bear in mind, however, the famous Travancore decision in *T. I. Sundaram Iyer* v. *S. I. Thandaveswara Iyer* [1946] Trav. L.R. 224 (F.B.) (cf. 25 T.L.R. 196, where the caste was Nambudri) where the *vara-dakshina* was held to be the property of the son, and his father was held to retain it as an express trustee for him.

3. The strict Mitakshara law, which is (at the time of writing) still in force in Mysore State only, requires that a *major* cannot be bound even where necessity is present without his express or implied consent.

4. A.I.R. 1949 F.C. 218=[1950] 1 M.L.J. 586, which should be read along with [1950] 1 M.L.J. 612; cf. *Palani Goundan* v. *Vanjiakkal*, [1956] 1 M.L.J. 498:— cases well worthy of study by one who wishes to

savour the precarious and intricate condition of the modern Hindu law.

5. It is a curious anomaly that whereas severance (partition as to *status*) almost always involves a renunciation and termination of the right of survivorship (see sec. 346 below), this does not apply with reference to the devolution of an impartible estate: *Chinnathayi* v. *Kulasekara,* A.I.R. 1952 S.C. 29.

6. Because of decisions on the effect of alienations by guardians appointed under the Guardians and Wards Act contrary to the terms of that statute: see for example *Gobardhan Lal* v. *Sheo Narayan,* A.I.R. 1929 Patna 202.

7. See *Reade* v. *Krishna,* (1886) I.L.R. 9 Madras 391, but compare *Albrecht* v. *Bathe,* 22 M.L.J. 247 and *Mokoond* v. *Nabodip,* (1899) I.L.R. 26 Calcutta 881. The leading case is *Skinner* v. *Orde* (1871) 14 M.I.A. 309. See *Besant* v. *Narayaniah,* (1915) I.L.R. 38 Madras 807 (P.C.) and *Radhi Bai* v. *Vessanamal,* (1917) 41 I.C. 571, where the court declined to regard as relevant for the purposes of the child's education the religion to which the natural guardian had recently adhered.

Chapter VI

1. An interesting account of this type of adoption is given in *Velayudhan Pillai Narayanan Pillai* v. *Nilakanthan D. Namboori,* A.I.R. 1955 N.U.C. 1101 (T.-C.).

2. Because the rule was supposed by the Privy Council to be of moral, not legal force; whereas, though no grounds were given for the distinction, the same Court held adoption of sisters' sons absolutely void

unless allowed by custom. The two decisions are not separated by more than a year.

3. The interesting question whether a wife or widow has an inherent power to give or take in adoption, which is relevant nowadays in Bombay, and in Madras where there is a difficulty in obtaining a husband's *sapinda's* assent, is very fully considered in the important case of *Shivaprasad Ganpatram Mehta* v. *Natwarlal Harilal Joshi*, A.I.R. 1949 Bombay 408.
4. It is open to question whether this rule (admitted after a change of the judicial mind in Bombay: *Putlabai* v. *Mahadu,* (1909) I.L.R. 33 Bom. 107) is in accord with public policy.
5. The authority (*Shamsing* v. *Santabai,* (1901) I.L.R. 25 Bombay 551) is one of those which is saved from being overruled by mere lapse of time.
6. As usual Bombay and Madras fail to agree. Bombay takes the view that no disqualification on his son's part will render the father son-less for the purpose of being entitled to adopt. Madras and Andhra however certainly ignore for this purpose the congenital idiot as a son, but whether in those States a deaf and dumb child, for example, whose rights of inheritance were saved by Act XII of 1928, counts as a son is quite uncertain. The Hindu Adoptions and Maintenance Act, 1956, consistent with its wholesale departure from the *shastra*, ought to have permitted a Hindu with a living son to adopt another, but now [Sec. 11 (a)] it forbids a Hindu to adopt a son if he has *any* Hindu son living.
7. Bombay and Madras cannot agree here either: the matter (which is very intricate) is discussed in *Aravamudha Iyengar* v. *Ramaswami Bhattar,* [1952] I M.L.J. 251, which was criticised in [1953] I M.L.J.

Notes of Cases 4 (and see S. Venkataraman, *Minority in Hindu law and competence to adopt,* [1952] II M.L.J. (Journal) 27 for a spirited attack on the decision).

8. *Deorao* v. *Raibhan,* A.I.R. 1954 Nagpur 357.
9. *Gurunath* v. *Kamalabai,* A.I.R. 1955 S.C. 206.
10. A problem in interpretation arises. Does the "Bill" mean that the widow may adopt at *any* age under 18? All that is required is that she should be a widow and should be authorised. We believe that a girl can marry validly at any age (despite the terms of Sec. 5 of the Hindu Marriage Act) and therefore might be a widow at, say, 12. Can she then adopt, whether in Madras or Bombay, below the age now allowed to her in either State? *Postscript*: the Hindu Adoptions and Maintenance Act, 1956, Sec. 8 (*b*), eliminates the problem.
11. If government permission was obtained the assent of relations or their presence at the ceremony might be dispensed with: *Heeralal* v. *Madadeo,* A.I.R. 1955 N.U.C. 1624.
12. A recent case on divesting of property in the hands of the adopted son is *Rakhalraj* v. *Debendra Nath,* A.I.R. 1948 Calcutta 356.
13. The whole subject is discussed in *Hindu Law*: *Adoptive Mothers*: *Another Difficult Problem for the Supreme Court,* (1955) 18 Supreme Court Journal (journal) 217 and ff.
14. *Panchaiti Akhara Udasi Nirwani* v. *Surajpal Singh,* A.I.R. 1945 P.C. 1 explained and applied in *Shivaji Ganpati* v. *Murlidhar,* (1953) 56 Bom. L.R. 426 (F.B.) and closely discussed by S. Vaidyanathan in *After-born coparceners and antecedent alienations under*

the Mitakshara school, [1952] I M.L.J. (journal) 7 and ff.

15. *Kancheti Ramakrishnayya* v. *Mandadi Narasayya,* [1954] II M.L.J. (Andhra) 53, upheld on appeal in [1956] An. W.R. 1120, where the court were much impressed by the dramatic reversal of the Madras doctrine in *Sivagami Achi* v. *Somasundaram Chettiar,* [1956] I M.L.J. 441 (F.B.); A.I.R. 1956 Madras 323 (F.B.), a case which was reported after the text (p. 162 above) had been printed.

16. *Shrinivas Krishnarao* v. *Narayan Devji,* A.I.R. 1954 S.C. 379, followed in *Shanmugavadivelu* v. *Kuppuswamy Pillai* [1954] II M.L.J. 220. A similar but less brilliant decision was given in Pakistan in *Joy Kumar Dutta* v. *Sitanath Dutta,* P.L.R. [1951] I Dacca 728. Mysore, in *Venkatiah* v. *Kalyanamma,* A.I.R. 1953 Mysore 92 (F.B.), denied all rights of divesting whatever. See also P. Duraiswami Aiyangar, *Adoption—Divesting of estate,* (1956) 69 L.W. 29-33. The Bombay High Court in a very remarkable decision (*Ramchandra Hanumant* v. *Balaji Dattu,* (1955) 57 Bom. L.R. 491 = A.I.R. 1955 Bom. 291 (F.B.) criticised in *Divesting: an important Full Bench decision on adoption,* (1956) 58 Bom. L.R. (journal) 1) has attempted to prevent divesting if the adoption takes place after the property has left the hands of the first taker. This makes confusion worse confounded.

17. A splendid example of the way in which theory flouts convenience is provided by *Gurupadappa* v. *Karishidappa,* (1953) 56 Bom.L.R. 252, where mesne profits over nearly 30 years were decreed in the adoptee's favour, much of the original nucleus of the property having been alienated in the meanwhile by his uncles or cousins under the impression that the shares that

were taken at partition were the separate property of the holders for the time being, and that any income derived thence would naturally belong to them absolutely.

18 *Pandurang* v. *Narmadabai,* (1932) I.L.R. 56 Bombay 395, where the strange Privy Council decision in *Krishnamurti Ayyar,* (1927) L.R. 54 I.A. 248, which is the leading case, was fully considered.

19. See note 17 above.

20. Students of legal curiosities may care to see *Some Troublesome Cases in Adoption,* (1953) 55 Bom.L.R. (journal) 1 and ff [now to be read subject to *Shrinivas' case* (note 16 above)] and then scrutinise the strange *ratio decidendi* in *Rani Lalita* v. *Vizianagaram,* (1953) 66 Madras L.W. 231. The comparable case of *Sashi Kanta* v. *Promode Chandra,* A.I.R. 1932 Calcutta 600, is probably not good law for reasons set out in the above-mentioned article. Now see Sec. 13 of the Hindu Adoptions and Maintenance Act, where perhaps the word "property" may be too vague!

CHAPTER VII

1. There is a very large literature on this subject. The student is recommended to consult Novakovitch, *La Zadrouga* ; Mayer, *Die bäuerlische Hauskommunion ;* Godin, *Das albanische Gewohnheitsrecht* (Z. f. vergl. Rechtsw., 1953) ; Trouton, *Peasant renaissance in Yugoslavia,* 1900-1950 ; and *Code Général des biens pour la principauté de Monténégro de 1888.* Sir Henry Maine was impressed by the similarity of the *zadrouga* with Mitakshara joint family.

2. See for example K. B. Gajendragadkar: *Why the present Hindu law of Survivorship applicable to joint family property should be abolished,* 1939. Sri R. K. Ranade and the authors of *Why Hindu Code?* take the same view.
3. *Chidambaram Chettiar* v. *Nachiappa Chettiar,* A.I.R. 1939 Madras 70; *Chidambaram Chettiar* v. *Subramaniam Chettiar,* A.I.R. 1953 Madras 492; and *P. L. P. N. Subramaniam Chettiar* v. *Kumarappa Chettiar,* A.I.R. 1955 Madras 144.
4. One would have thought that the question whether or not a coparcener intended to separate would be a fairly easy fact to establish: on the contrary, Bombay and Madras cannot agree whether after a coparcener institutes a suit for partition he has the right to withdraw his suit and reconstitute joint status, on the ground that while he seemed to want a partition when he sued for it he has changed his mind and (*ex post facto*) did not want it after all and was only pretending. See *Gangadharrao* v. *Ramchandra,* A.I.R. 1946 Bombay 146 and the excellent judgment in *Kurapati Radakrishna* v. *Satyanarayana,* A.I.R. 1949 Madras 173. As usual, Madras is right.
5. The situation where one coparcener murders another is quite extraordinary. No doubt he is treated as dead for the purpose of taking by survivorship from the murdered man, but he continues to be a coparcener, his own issue taking the surplus benefit which he cannot take—eventually he may take the whole by survivorship (?) from them: *Adiveppa* v. *Veerbhadrappa,* A.I.R. 1948 Bombay 111. The new provision in Sec. 25 of the Hindu Succession Act, 1956, does not directly set the doubt at rest.
6. *C. D. Deviah* v. *Karigowda,* A.I.R. 1954 Mysore 128.

7. Reference should be made to *Inheritance by, from and through Illegitimates at Hindu Law,* (1955) 57 Bom. L.R. (journal) 1 and ff.
8. The last is a straightforward addition to the Hindu law by judicial decision in Madras: *Athilinga Goundar* v. *Ramaswami Goundar,* I.L.R. [1945] Madras 297, where the authorities relied upon will not be found to support the judgment.
9. This extraordinary anomaly (*P. L. P. N. Subramaniam Chettiar* v. *Kumarappa Chettiar,* A.I.R. 1955 Madras 144) is not in practice so harmful as it might seem, since if the manager cannot repay himself nobody can. The Limitation Act has bedevilled the law of the Joint Family in various ways: see Note 14 to Chapter VI above; also the old rule re-applied in *J. Sreeram Sarma* v. *N. Krishnavenamma,* [1956] An. W.R. 565, contradicting A.I.R. 1953 Madras 894= [1953] I M.L.J. 31.
10. It is not generally realised how effectively this may curb the manager's tendency to improper spending. The best case on the subject is *Official Assignee of Madras* v. *Rajabadar Pillai,* A.I.R. 1924 Madras 458: cf. *Narendra Nath Roy* v. *Abani Kumar,* (1937) 42 C.W.N. 77.
11. This is the Madras view: *Egappa* v. *Ramanathan Chettiar,* I.L.R. [1942] Madras 526; *C. K. S. Krishnamurti* v. *Chidambaram Chettiar,* I.L.R. [1946] 670. [Bombay, as so often, did not agree with the first-cited decision: *Krishnadas Padmanabhrao* v. *Vithoba Annappa,* I.L.R. [1939] Bombay 340 (F.B.)]. The late High Court at Nagpur perpetrated an extraordinary decision when, in *Jankilal* v. *Jabarsingh,* I.L.R. [1956] Nagpur 121, 130-1, it ignored [1946] Madras 670 and, improperly relying on [1942] Madras 526, held that

the minors could sue to set aside a decree passed against the manager.

12. The Privy Council here set at rest an involved and prolonged controversy: see note 14 to Chapter VI above.
13. The matter is discussed fully in *Hindu Law: Mitakshara: The Pious Obligation and the doctrine of Antecedency: The end of a prolonged controversy?*, (1955) 18 Supreme Court Journal (journal), 1939 and ff.
14. What constitutes "taint" under this heading no one can say with complete confidence. The whole very confused subject of the Pious Obligation may be conveniently studied in the articles of R. K. Ranade in (1950) 52 Bom. L.R. (journal) 1-7 ; 33-41 ; (1953) 55 Bom. L.R. (journal) 94-102 ; (1954) 56 Bom. L.R. (journal) 81-90 ; (1955) 57 Bom. L.R. (journal) 57-62 ; and in the helpful recent cases of *P. Lakshmanaswami* v. *Raghavacharyulu,* I.L.R. [1943] Madras 717 ; *Darbeshwari Singh* v. *Raghunath,* A.I.R. 1949 Patna 515 ; and *Perumal Chetti* v. *Province of Madras,* [1955] I M.L.J. 370=A.I.R. 1955 Madras 382. Recently the old fallacy that the creditor must have notice of the taint (denied in [1943] Madras 717) has raised its head again: A.I.R. 1956 Nagpur 76.
15. *Shevanti Bai* v. *Janardhan,* A.I.R. 1949 Bombay 322 ; *Thani Chettiar* v. *Dakshinamurthy Mudaliar,* A.I.R. 1955 Madras 208.
16. *Venkittaramiengar* v. *Krishnaien Pappu Iyen,* (1886) 5 Trav. L.R. 112, refusing to follow British Indian decisions.
17. See *Three Questions arising out of the Hindu Women's Rights to Property Act, 1937,* (1954) 56 Bom. L.R. (journal) 1937 and ff. To make matters worse the Bombay Court have recently invented a

doctrine that even a *wife* (who cannot benefit under the Act of 1937) owns an "inchoate share" in joint family property so that a father can alienate only an interest corresponding to the share that he would obtain if he separated from his sons and gave his wife her share at Hindu law. No case better illustrates the weakness of case-Hindu law. It is *Parappa Ningappa* v. *Mallappa,* (1956) 58 Bom. L.R. 404= A.I.R. 1956 Bom. 332 (F.B.), criticised in (1957) 59 Bom. L.R. (journal).

18. Which is fictitiously considered to have become separate at the moment immediately preceding death for the purpose of valuation and assessment to tax. Compare the rules laid down in Secs. 6 & 7 of the Hindu Succession Act 1956 (below).

19. Madras does (*Kumbakonam Bank case,* [1956] I M.L.J. 58=A.I.R. 1956 Madras 306) but Bombay does not (*Shivramsa Benakosa* v. *Gurunathsa,* (1955) 58 Bom. L.R. 239) believe that a manager of a joint *trading* family can start virtually any new business. To make matters worse, in Marumakkattayam law, where we should not have expected it, there is actually a presumption of *tarwad* necessity to support the manager's alienations and there is no burden of proof, as in patrilineal law, upon the stranger to show that he made due enquiry (under *Hunooman Persaud's* case).

20. The matter is fully discussed in *Hindu law: the rights of the separated son* (1956) 19 Supreme Court Journal (journal), 103 and ff. The clause 7 of the Hindu Succession Bill there quoted was omitted for simplicity's sake from the Act itself.

21. *Iravi Pillai Parameswaran* v. *Mathevan Pillai Ramkrishna,* A.I.R. 1955 Trav.-Cochin 55 (F.B.).

22. For example the Travancore Nair Act, Act II of 1100=1925, the Malayala Kshatriya Act, Act VII of 1108=1932, the Madras Marumakkattayam Act, Act XXII of 1933, the Cochin Marumakkattayam Act, Act XXXIII of 1113=1938, and the Madras Aliyasantana Act, Act IX of 1949. The scope of the *karnavan's* powers will, as a result of the Hindu Succession Act (if not counteracted by appropriate action on the part of the members of families) rapidly dwindle away.
23. *Arunachala Mudaliar* v. *Muruganatha Mudaliar,* A.I.R. 1953 S.C. 495.
24. On this subject the Hindu Women's Rights to Property Act, 1937 has caused a strange difference of opinion between the High Courts: Bombay thinks (*Akoba Laxman* v. *Sai Genu,* A.I.R. 1941 Bombay 204) that the Act allows the unchaste widow to inherit, as the ordinary straightforward interpretation of the statute would certainly suggest, while Madras excludes her (*Ramaiya Konar* v. *Mottayya,* A.I.R. 1951 Madras 954). Calcutta has recently changed its mind: *Surja Kumar* v. *Manmatha Nath,* A.I.R. 1953 Calcutta 200, dissented from in *Kanailal Mitra* v. *Pannasashi Mitra,* A.I.R. 1954 Calcutta 588. No doubt Madras and Calcutta were right, but the Hindu Succession Act has totally abolished unchastity as a disqualification.
25. This can be a matter of great practical importance: see for example *Radha* v. *Commissioners of Income Tax, Madras,* A.I.R. 1950 Madras 538 and *Maguni Padhano* v. *Lokananidhi Lingaraj,* A.I.R. 1956 Orissa 1 (contra: *Commissioners of Income Tax* v. *Laxmi Narayan,* A.I.R. 1949 Nagpur 128) and *Ambalavana Pillai* v. *Gowri Ammal,* A.I.R. 1936 Madras 871.

26. The problem whether unauthorised alienations of joint family property are or are not void is dealt with in *Unauthorised alienations of Joint Family Property: Can they ever be Void rather than Voidable ?*, (1953) 55 Bom. L.R. (journal) 105. See also the special rule (if the guardian is a coparcener) in *Malkarjun Annarao* v. *Sarubai Shivyogi*, (1942) 45 Bom.L.R. 259, that a *de facto* guardian's alienation is void *ab initio*, confirmed and followed in *Tattya Mohyaji* v. *Rabha Dadaji*, (1952) 55 Bom. L.R. 40, despite the restatement of guardianship law in the Federal Court case referred to in sec. 206 above, and therefore rightly contradicted by implication in *Palani Goundan* v. *Vanjiakkal*, [1956] I M.L.J. 498=A.I.R. 1956 Madras 476. The welcome ruling that *gifts* of joint family property are only voidable came at last in [1955] An. W.R. 944.

27. This intricate and apparently anomalous rule was derived from the Privy Council decision in *Lakshmi Chand* v. *Mst. Anandi*, A.I.R. 1926 P.C. 54, considered in *Radha Ram* v. *Ganga Ram*, A.I.R. 1935 Lahore 661 and applied (with slight modifications) in *Seethiah* v. *Aravapalli*, A.I.R. 1931 Madras 106; *Babu Singh* v. *Mst. Lal Kuer*, A.I.R. 1933 Allahabad 830; and *Venkoba Sah* v. *Ranganayaki Ammal*, A.I.R. 1936 Madras 967. The Hindu Succession Act makes all interests in every sort of joint family alienable by will, except in the case of Mitakshara coparcenaries, where survivorship still plays a limited part (see sec. 499 above).

28. Precedents for this exist under the Shariat Act, 1937, Sec. 3, and the Cutchi Memons Act, 1920, Sec. 2; see also the old Madras Malabar Marriage Act, 1896. *Postscript*: Parliament has placed marriage (or regis-

tration of marriage) under the Special Marriage Act, 1954, as the only approved mode of escape. But this will in itself affect only two generations.

CHAPTER VIII

1. See *Sivagnanathammal* v. *Sankarapandian Pillai*, A.I.R. 1955 N.U.C. 1453 (Trav.-C.). But Madras, Bombay and Allahabad take a different view.
2. At the commencement of the concubinage: *Akku* v. *Ganesh*, I.L.R. [1945] Bombay 216 (F.B.), a most illuminating case, well illustrating the manner in which *shastric* texts are handled nowadays.
3. Since the father-in-law's duty is only moral while he lives, becoming *legal* at his death!
4. *Mst. Rupa Gauntiani* v. *Mst. Sriyabati*, A.I.R. 1955 Orissa 28.
5. The difficulty commenced (instead of being settled) with a Privy Council decision: *Ekradeshwari* v. *Homeshwar Singh*, A.I.R. 1929 P.C. 128. The latest case is *Mavji Kanji* v. *Shushila Chhaganlal*, A.I.R. 1955 Saurashtra 45.
6. For example in Malabar the Cochin Nambudiri Act (Act XVII of 1114=1939) Sec. 17 (a fixed proportion) and the Travancore Christian Succession Act (Act II of 1092=1916) Sec. 28 (a fixed proportion or Rs. 5,000 whichever is less). Incidentaly, until 1956 daughters in Ezhava families could not claim a share of the property for their dowry marriage expenses or otherwise, though their marriage expenses were a charge on the family.
7. This follows the current law: *Periambal Chettiar* v. *Sunderammal*, I.L.R. [1945] Madras 586.

8. For a study of Family Protection see the English Intestates Succession Act, 1952, and Tillard, *Family Inheritance*; see also Wright, *Testator's Family Maintenance in Australia and New Zealand*, Sydney, 1954; Potter, *Intestates' Estates and Family Provision*, London 1952; and Stephens, *Testator's Family Maintenance in New Zealand*, Wellington (N.Z.), 1934.

CHAPTER IX

1. *Shivprasad Deviprasad* v. *Jankibai Jugalkishore*, A.I.R. 1953 Bombay 321.
2. This is characteristic of the Dayabhaga school; an attempt to introduce it in Madras was indignantly repelled in *Uddi Rajamna* v. *Poornappagari*, A.I.R. 1951 Madras 1047.
3. *Shastric* texts say the contrary, but decisions have not followed them: *Karhiley* v. *Hira*, A.I.R. 1952 Allahabad 229 (F.B.); *S. Deivinayagam Pillai* v. *Subbiah Pillai*, A.I.R. 1954 Madras 727.
4. *Kisan Dhondu* v. *Shevantabai*, A.I.R. 1950 Bombay 254 (F.B.); see also *Lakshman Ayer* v. *Ponnammal*, I.L.R. [1951] Trav.-Cochin 812, which seems to side with Bombay against Madras. See also S. Vaidyanathan, *Bandhu Succession under the Mitakshara*, [1954] I M.L.J. (journal) 25 and ff.
5. The former dispute on this subject was recently settled by the Supreme Court: see note 4 to Chapter 1.
6. Reference should be made to the article referred to in note 6 to Chapter VII and also to the more recent (unsatisfactory) case of *Sadu Ganaji* v. *Shankerrao*, A.I.R. 1955 Nagpur 84.
7. In *Punukollu Paranthamayya* v. *P. Nayaratna Sikhamani*, A.I.R. 1949 Madras 825.

8. As to the definition of *asaudayika* ("other than that given by relations at or after marriage") the courts are not in complete agreement. A more conservative and a more generous approach are both represented, the latter distinctly more attractive when the woman has made acquisitions while living separately from her husband, or has taken bequests from her father and so on. See *Muthukaruppa* v. *Sellathammai*, (1916) I.L.R. 39 Madras 298; *Venkareddi* v. *Hanumant*, (1933) I.L.R. 57 Bombay 85: *Muthu Ramakrishna* v. *Marimuthu*, (1915) I.L.R. 38 Madras 1036; *Dhondappa* v. *Kasabai*, A.I.R. 1949 Nagpur 206; *Bhau* v. *Raghunath*, (1906) I.L.R. 30 Bombay 229, modified in *Bhagvanlal* v. *Bai Divali*, A.I.R. 1925 Bombay 445, which was followed in *S. P. Madaswami Pillai* v. *S. P. Madhavan Pillai*, [1947] Trav. L.R. 822, and overruled in *Gajanan* v. *Pandurang*, A.I.R. 1950 Bombay 178 (F.B.); and finally *Subramania Pillai* v. *S. P. Mathevan Pillai*, A.I.R. 1955 N.U.C. 1105 (T.-C.) (decided 13/12/1950 according to the report). The husband's right to use *stridhan* for his own purposes in an emergency should be compared.
9. *Karini Raja Rao* v. *Karini Chiranjeevulu*, A.I.R. 1955 Orissa 17.
10. *Dodda Subbareddi* v. *Gunturu Govindareddi*, A.I.R. 1955 Andhra 49, with which cf. *Ganga Bakhsh Singh* v. *Madho Singh*, A.I.R. 1955 Allahabad 288 (F.B.) and see also *Kalishanker Das* v. *Dhirendra Nath*, A.I.R. 1954 S.C. 505. The first-quoted case is contradicted on this point by *Sahu Madhu Das* v. *Pandit Mukund Ram*, (1955) 18 S.C.J. 417, 429.
11. *Beni Madho Sah* v. *Sm. Ram Kuer*, A.I.R. 1954 Patna 451.
12. In order to trace out this tenuous and characteristic

subtlety one should consult the following: *Sitanna* v. *Marivada Viranna,* A.I.R. 1934 P.C. 105 ; *Ali Mohammed* v. *Mst. Mughlani,* A.I.R. 1946 Lahore 180 ; *Mummareddi Nagi Reddi* v. *Pitti Durairaja Naidu,* [1951] S.C.R. 655 ; *Mahalu Shidappa* v. *Shankar Dadu,* (1952) 55 Bom.L.R. 301 ; *Phool Kuer* v. *Mst. Prem Kuer,* I.L.R. [1954] II Allahabad 195 (S.C.) ; *Natvarlal* v. *Dadubhai Manubhai,* (1953) 56 Bom.L.R. 447 (S.C.) and *Kalishanker Das* (*cit. sup.* note 10).

13. A violent controversy has raged over the true effect of *Lajwanti* v. *Safa Chand,* A.I.R. 1924 P.C. 121, on which see *A strange Privy Council decision and the Hindu Widow's Remarriage Act,* 1856, A.I.R. 1955 Journal 10 and ff, and the later elaborate case of *Gunderao* v. *Venkamma,* A.I.R. 1955 Hyderabad 3 (F.B.), where the minority judges would seem to be more nearly correct.

13.* See *Nanu Divakaran* v. *Velumpi Nani,* I.L.R. [1954] Trav.-Cochin 1280, for a discussion of patriliny amongst Ezhavas.

14. A knowledge of Marumakkattayam can be had by reference to P. R. Sundara Iyer, Wigram and Moore, the Report of the Malabar Marriage Commission, to the relevant chapters in Mayne and Raghavachariar, and to V. N. Subramanya Iyer. A. C. Mayer's *Land and Society in Malabar,* O.U.P., 1952, gives a first-hand impression of life in the law-modified set-up prior to the Hindu Succession Act. Articles in [1952] Kerala L. T. (journal) 9 ; [1953] K.L.T. (journal) 10 ; and [1954] K.L.T. (journal) 49 deal with the impact of the "Hindu Code Bill" on Malabar law.

15. Sec. 5 (ii). Quite a good deal of rather odd law will survive. In Madras alone (wherever an impartible estate has managed to escape confiscatory legisla-

tion) all the incidents of joint family property will attach to the exempted estates except partibility; elsewhere collaterals can obtain it by survivorship, even if divided from the holder except in special circumstances; sons of the previous holder may be maintained for life out of it: widows can obtain maintenance out of it, but not illegitimate sons, except where custom permits. And the holder has the right to blend immovable property with it so as to make that also impartible, but perhaps not movable. However, the scope for such protected estates, outside South India, will be very small indeed.

16. Perhaps a non-Hindu may be permitted to acclaim this succession as a most salutary reform; but the radical line taken by the Act may prove to be too advanced.

17. The present law allows a murderer directly to benefit his own issue, and this also might be remedied by appropriate legislation. Cases arose in *Stanumurthiayya* v. *Ramappa*, [1942] I M.L.J. 21; *Adiveppa* v. *Veerbhadrappa*, A.I.R. 1948 Bombay 111; and *Nakcched Singh* v. *Bijai Bahadur Singh*, A.I.R. 1953 Allahabad 759.

18. As long ago as 1869 the Maharaja of Travancore released by Proclamation (of 17th Mithunam 1044) his right to take by escheat the property of Hindus whose only heirs were non-Hindus. Before the Christian Succession Act and the unfortunate decision in *E. N. Ananchaperumal Nadar* v. *R. P. Muthayya Nadar*, [1944] Trav.L.R. 595, Hindu and Christian Nadars in Travancore enjoyed uninterrupted reciprocal rights of inheritance. But in the former British India if a Hindu dies leaving as his only relation the son of a brother who was converted to Christianity or Islam, the property will go to the State.

Admittedly the Islamic (and Anglo-Muhammadan) law retains such distinctions, but in the modern secular state they are, it is submitted, entirely anachronistic.

19. It is not characteristic of French law and is flatly contrary to German and English law, but is usual in the Latin American countries, Spain, Portugal and Italy. The alternative usual in Common Law countries is to admit to the succession the descendants howlow-soever of named ascendants. Whether the estate should be divided into halves, so that one half goes to the nearest heirs on the father's side and the other to those on the mother's side, with further possible subdivision as we go higher in the family tree, is open to considerable discussion. And the matter is still open since the provision of the Hindu Succession Act is bound to be amended eventually.

20. With the exception of small communities in Cochin, and possibly Travancore also.

21. (1954) 70 L.Q.R. 492 and ff; Current Legal Problems, 1954, 114 and ff; see also the *First Report of the Private International Law Committee* (Cmd. 9068), 1954, and the American *Restatement*, Conflict of Laws, also Beale, *Conflict of Laws*.

22. This is provided for in the English Administration of Estates Act, 1925, though the payments are made administratively, not judicially, and this has attracted unfavourable comment. The rule is most useful since it enables the property to pass to persons mentioned in a will which, for some technical reason, cannot take effect as a testamentary document, to mistresses and illegitimate children, life-long friends, housekeepers, servants and so on.

23. The rule proposed in Sec. 24 is a slight improvement on the English rule, which had to be altered hastily

(in another connection) when, in 1952, the spouse was given a very much larger benefit on intestacy. The matter requires close attention. A suggestion given in *The Hindu Succession Bill, 1954,* (1954) 56 Bom.L.R. (Journal), 97 at 106, might prove helpful, even though cumbersome.

24. Cochin Makkathayam Thiyya Act, Act XVIII of 1115 = 1940, Sec. 5. The Islamic law tends to seek to equiparate hermaphrodites with the sex they most nearly resemble—but this seems unreasonable: the Jewish law made special provision for such persons in certain contexts in the law of succession.

Chapter X

1. See Sec. 354 and cases referred to in the article mentioned in Note 17 to Chapter V. More remarkable examples are *Indu Bhusan* v. *Mrityunjoy Pal*, [1946] 1 Cal. 128 and *Shyamu Ganpati* v. *Vishwanath Ganpati* (1955) 57 Bom. L.R. 807 = A.I.R. 1955 Bom. 410, on which see the destructive criticism in *Two difficult Bombay cases in Hindu law,* (1956) 58 Bom. L.R. (journal) 97 and ff.

APPENDIX II

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(*Note*: The authorised Law Reports of the various States, and the principal private Reports referred to in (4) below, are not separately listed. T.L.L.=the Lectures delivered by the author in question as Tagore Law Professor at Calcutta University for the year indicated. Some time after this Bibliography had been set up in type a very useful compilation reached my hands entitled *Bibliography on the Hindu Succession Bill, 1954* (*Bibliography No. 28*), Lok Sabha Secretariat, New Delhi, July, 1955. It contains not merely a good list of books and some (though comparatively few) articles which might usefully have been consulted by the legislators, but also gives a summary history of the Succession Part of the "Hindu Code Bill".)

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APPENDIX III

THE TEXT OF THE ACTS AND THE LATEST DRAFT OF A PART OF THE "HINDU CODE BILL"

Chapter I

The Hindu Marriage Act, 1955
Act No. 25 of 1955

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

Preliminary

1. *Short title and extent.*—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. *Application of Act.*—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such

person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group of family to which such parent belongs or belonged; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law

among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy ; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family ;

(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act ;

(*c*) "full blood" and "half blood"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives ;

(*d*) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands ;

Explanation.—In clauses (*c*) and (*d*), "ancestor" includes the father and "ancestress" the mother ;

(*e*) "prescribed" means prescribed by rules made under this Act ;

(*f*) (*i*) "*sapinda* relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation ;

(*ii*) two persons are said to be "*sapindas*" of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them ;

(*g*) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(*i*) if one is a lineal ascendant of the other ; or

(*ii*) if one was the wife or husband of a lineal ascendant or descendant of the other ; or

(*iii*) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other : or

(*iv*) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters ;

Explanation.—For the purposes of clauses (*f*) and (*g*), relationship includes—

(*i*) relationship by half or uterine blood as well as by full blood ;

(*ii*) illegitimate blood relationship as well as legitimate ;

(*iii*) relationship by adoption as well as by blood : and all terms of relationship in those clauses shall be considered accordingly.

4. *Overriding effect of the Act.*—Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

Hindu Marriages

5. *Conditions for a Hindu marriage.*—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

(*i*) neither party has a spouse living at the time of the marriage ;

(*ii*) neither party is an idiot or a lunatic at the time of the marriage ;

(*iii*) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage ;

(*iv*) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two ;

(*v*) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two ;

(*vi*) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

6. *Guardianship in marriage.*—(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:—

(*a*) the father ;

(*b*) the mother ;

(*c*) the paternal grandfather ;

(*d*) the paternal grandmother ;

(*e*) the brother by full blood; as between brothers the elder being preferred;

(*f*) the brother by half blood; as between brothers by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(*g*) the paternal uncle by full blood; as between paternal uncles the elder being preferred;

(*h*) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(*i*) the maternal grandfather;

(*j*) the maternal grandmother;

(*k*) the maternal uncle by full blood; as between maternal uncles the elder being preferred:

Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. *Ceremonies for a Hindu marriage.*—(1) A Hindu

marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. *Registration of Hindu marriages.*—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

Restitution of Conjugal Rights and Judicial Separation

9. *Restitution of conjugal rights.*—(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

10. *Judicial separation.*—(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party—

(*a*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or

(*b*) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party : or

(*c*) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy ; or

(*d*) has, immediately before the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner ; or

(*e*) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition ; or

(*f*) has after the solemnization of the marriage had sexual intercourse with any person other than his or her spouse.

Explanation.—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

Nullity of Marriage and Divorce

11. *Void marriages.*—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of section 5.

12. *Voidable marriages.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(*a*) that the respondent was impotent at the time of

the marriage and continued to be so until the institution of the proceeding ; or

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of section 5: or

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud ; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1) shall be entertained if—

(*i*) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate, or, as the case may be, the fraud had been discovered ;

(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged ;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage ; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. *Divorce.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(*i*) is living in adultery ; or

(*ii*) has ceased to be a Hindu by conversion to another religion ; or

(*iii*) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition ; or

(*iv*) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy ; or

(*v*) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form ; or

(*vi*) has renounced the world by entering any religious order ; or

(*vii*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive ; or

(*viii*) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party ; or

(*ix*) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

(*i*) in the case of any marriage solemnized before the commencement of this Act, that the husband had

married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(*iii*) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

14. *No petition for divorce to be presented within three years of marriage.*—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the

expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. *Divorced persons when may marry again.*—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. *Legitimacy of children of void and voidable marriages.*—Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of havnig been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. *Punishment of bigmay.*—Any marriage between

two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living: and the provisions of sections 494 and 495 of the Indian Penal Code (Act XLV of 1860) shall apply accordingly.

18. *Punishment for contravention of certain other conditions for a Hindu marriage.*—Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*), (*v*) and (*vi*) or section 5 shall be punishable—

(*a*) in the case of a contravention of the condition specified in clause (*iii*) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (*v*) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(*c*) in the case of a contravention of the condition specified in clause (*vi*) of section 5, with fine which may extend to one thousand rupees.

Jurisdiction and Procedure

19. *Court to which petition should be made.*—Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. *Contents and verification of petition.*—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits, the facts on which the claim to relief is founded and shall also state that there

tration of marriage) under the Special Marriage Act, 1954, as the only approved mode of escape. But this will in itself affect only two generations.

CHAPTER VIII

1. See *Sivagnanathammal* v. *Sankarapandian Pillai*, A.I.R. 1955 N.U.C. 1453 (Trav.-C.). But Madras, Bombay and Allahabad take a different view.
2. At the commencement of the concubinage: *Akku* v. *Ganesh*, I.L.R. [1945] Bombay 216 (F.B.), a most illuminating case, well illustrating the manner in which *shastric* texts are handled nowadays.
3. Since the father-in-law's duty is only moral while he lives, becoming *legal* at his death!
4. *Mst. Rupa Gauntiani* v. *Mst. Sriyabati*, A.I.R. 1955 Orissa 28.
5. The difficulty commenced (instead of being settled) with a Privy Council decision: *Ekradeshwari* v. *Homeshwar Singh*, A.I.R. 1929 P.C. 128. The latest case is *Mavji Kanji* v. *Shushila Chhaganlal*, A.I.R. 1955 Saurashtra 45.
6. For example in Malabar the Cochin Nambudiri Act (Act XVII of 1114=1939) Sec. 17 (a fixed proportion) and the Travancore Christian Succession Act (Act II of 1092=1916) Sec. 28 (a fixed proportion or Rs. 5,000 whichever is less). Incidentaly, until 1956 daughters in Ezhava families could not claim a share of the property for their dowry marriage expenses or otherwise, though their marriage expenses were a charge on the family.
7. This follows the current law: *Periambal Chettiar* v. *Sunderammal*, I.L.R. [1945] Madras 586.

8. For a study of Family Protection see the English Intestates Succession Act, 1952, and Tillard, *Family Inheritance* ; see also Wright, *Testator's Family Maintenance in Australia and New Zealand*, Sydney, 1954 ; Potter, *Intestates' Estates and Family Provision*, London 1952 ; and Stephens, *Testator's Family Maintenance in New Zealand*, Wellington (N.Z.), 1934.

CHAPTER IX

1. *Shivprasad Deviprasad* v. *Jankibai Jugalkishore*, A.I.R. 1953 Bombay 321.
2. This is characteristic of the Dayabhaga school ; an attempt to introduce it in Madras was indignantly repelled in *Uddi Rajamna* v. *Poornappagari*, A.I.R. 1951 Madras 1047.
3. *Shastric* texts say the contrary, but decisions have not followed them: *Karhiley* v. *Hira*, A.I.R. 1952 Allahabad 229 (F.B.) ; *S. Deivinayagam Pillai* v. *Subbiah Pillai*, A.I.R. 1954 Madras 727.
4. *Kisan Dhondu* v. *Shevantabai*, A.I.R. 1950 Bombay 254 (F.B.) ; see also *Lakshman Ayer* v. *Ponnammal*, I.L.R. [1951] Trav.-Cochin 812, which seems to side with Bombay against Madras. See also S. Vaidyanathan, *Bandhu Succession under the Mitakshara*, [1954] I M.L.J. (journal) 25 and ff.
5. The former dispute on this subject was recently settled by the Supreme Court: see note 4 to Chapter 1.
6. Reference should be made to the article referred to in note 6 to Chapter VII and also to the more recent (unsatisfactory) case of *Sadu Ganaji* v. *Shankerrao*, A.I.R. 1955 Nagpur 84.
7. In *Punukollu Paranthamayya* v. *P. Nayaratna Sikhamani*, A.I.R. 1949 Madras 825.

8. As to the definition of *asaudayika* ("other than that *given* by relations at or after marriage") the courts are not in complete agreement. A more conservative and a more generous approach are both represented, the latter distinctly more attractive when the woman has made acquisitions while living separately from her husband, or has taken bequests from her father and so on. See *Muthukaruppa* v. *Sellathammai,* (1916) I.L.R. 39 Madras 298; *Venkareddi* v. *Hanumant,* (1933) I.L.R. 57 Bombay 85: *Muthu Ramakrishna* v. *Marimuthu,* (1915) I.L.R. 38 Madras 1036; *Dhondappa* v. *Kasabai,* A.I.R. 1949 Nagpur 206; *Bhau* v. *Raghunath,* (1906) I.L.R. 30 Bombay 229, modified in *Bhagvanlal* v. *Bai Divali,* A.I.R. 1925 Bombay 445, which was followed in *S. P. Madaswami Pillai* v. *S. P. Madhavan Pillai,* [1947] Trav. L.R. 822, and overruled in *Gajanan* v. *Pandurang,* A.I.R. 1950 Bombay 178 (F.B.); and finally *Subramania Pillai* v. *S. P. Mathevan Pillai,* A.I.R. 1955 N.U.C. 1105 (T.-C.) (decided 13/12/1950 according to the report). The husband's right to use *stridhan* for his own purposes in an emergency should be compared.
9. *Karini Raja Rao* v. *Karini Chiranjeevulu,* A.I.R. 1955 Orissa 17.
10. *Dodda Subbareddi* v. *Gunturu Govindareddi,* A.I.R. 1955 Andhra 49, with which cf. *Ganga Bakhsh Singh* v. *Madho Singh,* A.I.R. 1955 Allahabad 288 (F.B.) and see also *Kalishanker Das* v. *Dhirendra Nath,* A.I.R. 1954 S.C. 505. The first-quoted case is contradicted on this point by *Sahu Madhu Das* v. *Pandit Mukund Ram,* (1955) 18 S.C.J. 417, 429.
11. *Beni Madho Sah* v. *Sm. Ram Kuer,* A.I.R. 1954 Patna 451.
12. In order to trace out this tenuous and characteristic

subtlety one should consult the following: *Sitanna* v. *Marivada Viranna,* A.I.R. 1934 P.C. 105 ; *Ali Mohammed* v. *Mst. Mughlani,* A.I.R. 1946 Lahore 180 ; *Mummareddi Nagi Reddi* v. *Pitti Duraiaraju Naidu,* [1951] S.C.R. 655 ; *Mahalu Shidappa* v. *Shankar Dadu,* (1952) 55 Bom.L.R. 301 ; *Phool Kuer* v. *Mst. Prem Kuer,* I.L.R. [1954] II Allahabad 195 (S.C.) ; *Natvarlal* v. *Dadubhai Manubhai,* (1953) 56 Bom.L.R. 447 (S.C.) and *Kalishanker Das* (*cit. sup.* note 10).

13. A violent controversy has raged over the true effect of *Lajwanti* v. *Safa Chand,* A.I.R. 1924 P.C. 121, on which see *A strange Privy Council decision and the Hindu Widow's Remarriage Act,* 1856, A.I.R. 1955 Journal 10 and ff, and the later elaborate case of *Gunderao* v. *Venkamma,* A.I.R. 1955 Hyderabad 3 (F.B.), where the minority judges would seem to be more nearly correct.

13.* See *Nanu Divakaran* v. *Velumpi Nani,* I.L.R. [1954] Trav.-Cochin 1280, for a discussion of patriliny amongst Ezhavas.

14. A knowledge of Marumakkattayam can be had by reference to P. R. Sundara Iyer, Wigram and Moore, the Report of the Malabar Marriage Commission, to the relevant chapters in Mayne and Raghavachariar, and to V. N. Subramanya Iyer. A. C. Mayer's *Land and Society in Malabar,* O.U.P., 1952, gives a first-hand impression of life in the law-modified set-up prior to the Hindu Succession Act. Articles in [1952] Kerala L. T. (journal) 9 ; [1953] K.L.T. (journal) 10 ; and [1954] K.L.T. (journal) 49 deal with the impact of the "Hindu Code Bill" on Malabar law.

15. Sec. 5 (ii). Quite a good deal of rather odd law will survive. In Madras alone (wherever an impartible estate has managed to escape confiscatory legisla-

tion) all the incidents of joint family property will attach to the exempted estates except partibility: elsewhere collaterals can obtain it by survivorship, even if divided from the holder except in special circumstances; sons of the previous holder may be maintained for life out of it: widows can obtain maintenance out of it, but not illegitimate sons, except where custom permits. And the holder has the right to blend immovable property with it so as to make that also impartible, but perhaps not movable. However, the scope for such protected estates, outside South India, will be very small indeed.

16. Perhaps a non-Hindu may be permitted to acclaim this succession as a most salutary reform; but the radical line taken by the Act may prove to be too advanced.

17. The present law allows a murderer directly to benefit his own issue, and this also might be remedied by appropriate legislation. Cases arose in *Stanumurthiayya* v. *Ramappa*, [1942] I M.L.J. 21; *Adiveppa* v. *Veerbhadrappa*, A.I.R. 1948 Bombay 111; and *Nakched Singh* v. *Bijai Bahadur Singh*, A.I.R. 1953 Allahabad 759.

18. As long ago as 1869 the Maharaja of Travancore released by Proclamation (of 17th Mithunam 1044) his right to take by escheat the property of Hindus whose only heirs were non-Hindus. Before the Christian Succession Act and the unfortunate decision in *E. N. Ananchaperumal Nadar* v. *R. P. Muthayya Nadar*, [1944] Trav.L.R. 595, Hindu and Christian Nadars in Travancore enjoyed uninterrupted reciprocal rights of inheritance. But in the former British India if a Hindu dies leaving as his only relation the son of a brother who was converted to Christianity or Islam, the property will go to the State.

Admittedly the Islamic (and Anglo-Muhammadan) law retains such distinctions, but in the modern secular state they are, it is submitted, entirely anachronistic.

19. It is not characteristic of French law and is flatly contrary to German and English law, but is usual in the Latin American countries, Spain, Portugal and Italy. The alternative usual in Common Law countries is to admit to the succession the descendants how-low-soever of named ascendants. Whether the estate should be divided into halves, so that one half goes to the nearest heirs on the father's side and the other to those on the mother's side, with further possible subdivision as we go higher in the family tree, is open to considerable discussion. And the matter is still open since the provision of the Hindu Succession Act is bound to be amended eventually.
20. With the exception of small communities in Cochin, and possibly Travancore also.
21. (1954) 70 L.Q.R. 492 and ff ; Current Legal Problems, 1954, 114 and ff ; see also the *First Report of the Private International Law Committee* (Cmd. 9068), 1954, and the American *Restatement*, Conflict of Laws, also Beale, *Conflict of Laws*.
22. This is provided for in the English Administration of Estates Act, 1925, though the payments are made administratively, not judicially, and this has attracted unfavourable comment. The rule is most useful since it enables the property to pass to persons mentioned in a will which, for some technical reason, cannot take effect as a testamentary document, to mistresses and illegitimate children, life-long friends, housekeepers, servants and so on.
23. The rule proposed in Sec. 24 is a slight improvement on the English rule, which had to be altered hastily

(in another connection) when, in 1952, the spouse was given a very much larger benefit on intestacy. The matter requires close attention. A suggestion given in *The Hindu Succession Bill, 1954,* (1954) 56 Bom.L.R. (Journal), 97 at 106, might prove helpful, even though cumbersome.

24. Cochin Makkathayam Thiyya Act, Act XVIII of 1115=1940, Sec. 5. The Islamic law tends to seek to equiparate hermaphrodites with the sex they most nearly resemble—but this seems unreasonable: the Jewish law made special provision for such persons in certain contexts in the law of succession.

Chapter X

1. See Sec. 354 and cases referred to in the article mentioned in Note 17 to Chapter V. More remarkable examples are *Indu Bhusan* v. *Mrityunjoy Pal,* [1946] 1 Cal. 128 and *Shyamu Ganpati* v. *Vishwanath Ganpati* (1955) 57 Bom. L.R. 807=A.I.R. 1955 Bom. 410, on which see the destructive criticism in *Two difficult Bombay cases in Hindu law,* (1956) 58 Bom. L.R. (journal) 97 and ff.

APPENDIX II

SELECT BIBLIOGRAPHY

(*Note*: The authorised Law Reports of the various States, and the principal private Reports referred to in (4) below, are not separately listed. T.L.L.=the Lectures delivered by the author in question as Tagore Law Professor at Calcutta University for the year indicated. Some time after this Bibliography had been set up in type a very useful compilation reached my hands entitled *Bibliography on the Hindu Succession Bill, 1954* (*Bibliography No. 28*), Lok Sabha Secretariat, New Delhi, July, 1955. It contains not merely a good list of books and some (though comparatively few) articles which might usefully have been consulted by the legislators, but also gives a summary history of the Succession Part of the "Hindu Code Bill".)

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APPENDIX III

THE TEXT OF THE ACTS AND THE LATEST DRAFT OF A PART OF THE "HINDU CODE BILL"

CHAPTER I

The Hindu Marriage Act, 1955
Act No. 25 of 1955

An Act to amend and codify the law relating to marriage among Hindus

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:—

Preliminary

1. *Short title and extent.*—(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. *Application of Act.*—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such

person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group of family to which such parent belongs or belonged; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law

among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*b*) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(*c*) "full blood" and "half blood"—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

(*d*) "uterine blood"—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.—In clauses (*c*) and (*d*), "ancestor" includes the father and "ancestress" the mother;

(*e*) "prescribed" means prescribed by rules made under this Act:

(*f*) (*i*) "*sapinda* relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(*ii*) two persons are said to be "*sapindas*" of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them ;

(*g*) "degrees of prohibited relationship"—two persons are said to be within the "degrees of prohibited relationship"—

(*i*) if one is a lineal ascendant of the other ; or

(*ii*) if one was the wife or husband of a lineal ascendant or descendant of the other ; or

(*iii*) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other : or

(*iv*) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters ;

Explanation.—For the purposes of clauses (*f*) and (*g*), relationship includes—

(*i*) relationship by half or uterine blood as well as by full blood ;

(*ii*) illegitimate blood relationship as well as legitimate ;

(*iii*) relationship by adoption as well as by blood : and all terms of relationship in those clauses shall be considered accordingly.

4. *Overriding effect of the Act.*—Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act ;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

Hindu Marriages

5. *Conditions for a Hindu marriage.*—A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:—

(*i*) neither party has a spouse living at the time of the marriage ;

(*ii*) neither party is an idiot or a lunatic at the time of the marriage ;

(*iii*) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage ;

(*iv*) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two ;

(*v*) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two ;

(*vi*) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

6. *Guardianship in marriage.*—(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:—

(*a*) the father ;
(*b*) the mother ;
(*c*) the paternal grandfather ;
(*d*) the paternal grandmother ;

(*e*) the brother by full blood; as between brothers the elder being preferred;

(*f*) the brother by half blood; as between brothers by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(*g*) the paternal uncle by full blood; as between paternal uncles the elder being preferred;

(*h*) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;

Provided that the bride is living with him and is being brought up by him;

(*i*) the maternal grandfather;

(*j*) the maternal grandmother;

(*k*) the maternal uncle by full blood; as between maternal uncles the elder being preferred:

Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-section (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. *Ceremonies for a Hindu marriage.*—(1) A Hindu

marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. *Registration of Hindu marriages.*—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

Restitution of Conjugal Rights and Judicial Separation

9. *Restitution of conjugal rights.*—(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.

10. *Judicial separation.*—(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party—

(*a*) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition ; or

(*b*) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party ; or

(*c*) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy ; or

(*d*) has, immediately before the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner ; or

(*e*) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition ; or

(*f*) has after the solemnization of the marriage had sexual intercourse with any person other than his or her spouse.

Explanation.—In this section, the expression "desertion", with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

Nullity of Marriage and Divorce

11. *Void marriages.*—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (*i*), (*iv*) and (*v*) of section 5.

12. *Voidable marriages.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

(*a*) that the respondent was impotent at the time of

the marriage and continued to be so until the institution of the proceeding ; or

(*b*) that the marriage is in contravention of the condition specified in clause (*ii*) of section 5: or

(*c*) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud ; or

(*d*) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(*a*) on the ground specified in clause (*c*) of sub-section (1) shall be entertained if—

(*i*) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered-; or

(*ii*) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate, or, as the case may be, the fraud had been discovered ;

(*b*) on the ground specified in clause (*d*) of sub-section (1) shall be entertained unless the court is satisfied—

(*i*) that the petitioner was at the time of the marriage ignorant of the facts alleged ;

(*ii*) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage ; and

(*iii*) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. *Divorce.*—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(*i*) is living in adultery ; or

(*ii*) has ceased to be a Hindu by conversion to another religion ; or

(*iii*) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition ; or

(*iv*) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy ; or

(*v*) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form ; or

(*vi*) has renounced the world by entering any religious order ; or

(*vii*) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive ; or

(*viii*) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party ; or

(*ix*) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

(*i*) in the case of any marriage solemnized before the commencement of this Act, that the husband had

married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition ; or

(*iii*) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

14. *No petition for divorce to be presented within three years of marriage.*—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the

expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. *Divorced persons when may marry again.*—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again:

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. *Legitimacy of children of void and voidable marriages.*—Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of havnig been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. *Punishment of bigmay.*—Any marriage between

two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living: and the provisions of sections 494 and 495 of the Indian Penal Code (Act XLV of 1860) shall apply accordingly.

18. *Punishment for contravention of certain other conditions for a Hindu marriage.*—Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (*iii*), (*iv*), (*v*) and (*vi*) or section 5 shall be punishable—

(*a*) in the case of a contravention of the condition specified in clause (*iii*) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(*b*) in the case of a contravention of the condition specified in clause (*iv*) or clause (*v*) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(*c*) in the case of a contravention of the condition specified in clause (*vi*) of section 5, with fine which may extend to one thousand rupees.

Jurisdiction and Procedure

19. *Court to which petition should be made.*—Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. *Contents and verification of petition.*—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits, the facts on which the claim to relief is founded and shall also state that there

is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints, and may, at the hearing, be referred to as evidence.

21. *Application of Act V of 1908.*—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908 (Act V of 1908).

22. *Proceedings may be* in camera *and may not be printed or published.*—(1) A proceeding under this Act shall be conducted *in camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

23. *Decree in proceedings.*—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(*a*) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(*b*) where the ground of the petition is the ground specified in clause (*f*) of sub-section (1) of section 10, or in clause (*i*) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or

condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(*c*) the petition is not presented or prosecuted in collusion with the respondent, and

(*d*) there has not been any unnecessary or improper delay in instituting the proceeding, and

(*e*) there is no other legal ground why relief should not be granted,

then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

24. *Maintenance* pendente lite *and expenses of proceedings.*—Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. *Permanent alimony and maintenance.*—(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmar-

ried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. *Custody of children.*—In any proceeding under this Act, the court may, from time to time, pass interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. *Disposal of property.*—In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. *Enforcement of, and appeal from, decrees and orders.*—All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

Provided that there shall be no appeal on the subject of costs only.

Savings and Repeals.

29. *Savings.*—(1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such

proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954 (43 of 1954) with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

30. *Repeals.*—The Hindu Marriage Disabilities Removal Act, 1946 (XXVIII of 1946), the Hindu Marriages Validity Act, 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriages Act, 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act, 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act, 1950 (Saurashtra Act V of 1950), and the Saurashtra Hindu Divorce Act, 1952 (Saurashtra Act XXX of 1952) are hereby repealed.

CHAPTER II

The Hindu Minority and Guardianship Act, 1956
(Act No. 32 of 1953)

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:—

1. *Short title and extent.*—(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domi-

ciled in the territories to which this Act extends who are outside the said territories.

2. *Act to be supplemental to Act 8 of 1890.*—The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890.

3. *Application of Act.*—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person domiciled in India who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus by religion within the meaning of this Act,—

(*a*) any illegitimate child both of whose parents are Hindus,

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu and who is brought up as a member of the tribe, community, group of family to which such parents belongs or belonged, and

(*c*) any person who is a convert or re-convert to the Hindu religion.

(2) Notwithstanding anything contained in sub-section (1), nothing containing in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the

Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

4. *Definitions.*—In this Act—

(*a*) "minor" means a person who has not completed the age of eighteen years;

(*b*) "guardian" means a person having the care of the person of a minor or of his property or of both his person and property, and includes—

(*i*) a natural guardian,

(*ii*) a guardian appointed by the will of the minor's father or mother,

(*iii*) a guardian appointed or declared by a court, and

(*iv*) a person empowered to act as such by or under any enactment relating to any court of wards.

5. *Over-riding effect of Act.*—Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(*b*) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

6. *Natural guardians of a Hindu minor.*—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property

(excluding his or her undivided interest in joint family property), are—

(*a*) in the case of a boy or unmarried girl—the father, and after him, the mother; provided that the custody of a minor who has not completed the age of three years shall ordinarily be with the mother;

(*b*) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother and after her, the father;

(*c*) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

(*a*) if he had ceased to be a Hindu, or

(*b*) if he completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sannyasi*).

Explanation.—In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother.

7. *Natural guardianship of adopted son.*—The natural guardianship of an adopted son who is a minor passes, on adoption, from the family of his birth to the family of his adoption.

8. *Powers of natural guardian.*—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the Court—

(*a*) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor ; or

(*b*) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any other person affected thereby.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

(*a*) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof :

(*b*) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act ; and

(*c*) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, "court" means the city civil court or a district court or a court empowered under section 4A

of the Guardians and Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

9. *Testamentary guardian and his powers.*—(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's

father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10. A minor shall be incompetent to act as guardian of the property of any minor.

11. De facto *guardian not to deal with minor's property.*—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

12. *Guardian not to be appointed for minor's undivided interest in joint family property.*—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

13. *Welfare of minor to be paramount consideration.*—(1) In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

CHAPTER III

The Adoption Part of the "Hindu Code" (Fourth Draft: 1951)

[See Sections 1—17 and 30 of the Hindu Adoptions and Maintenance Act, 1956, below.]

CHAPTER I

Adoption generally

52. *Prohibition of adoption in contravention of this Part.*

(1) No adoption shall be made after the commencement of this Code by or to a male Hindu except in accordance with the provisions contained in this Part.

(2) Except in the cases referred to in sub-section (2) of section 66, any adoption made in contravention of this Part shall be void.

(3) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he could not have acquired except by reason of the adoption nor destroy the rights of any person in the family of birth.

53. *Requisites of a valid adoption.*—No adoption shall be valid unless—

(*i*) the person adopting has the capacity, and also the right, to take in adoption :

(*ii*) the person giving in adoption has the capacity to do so ;

(*iii*) the person adopted is capable of being taken in adoption :

(*iv*) the adoption is completed by a physical giving and taking : and

(*v*) the adoption complies with the other conditions mentioned in this Part.

Capacity to take in adoption

54. *Capacity of a male Hindu to take in adoption.*—Any male Hindu who is of sound mind and has completed the age of eighteen years has the capacity to take a son in adoption:

Provided that a Hindu who has a wife living shall not adopt except with the consent of his wife or, if he has more than one wife, except with the consent of at least one of such wives, unless the wife or all the wives, as the case may be, is or are incapable of giving consent.

Explanation.—For the purposes of this section, a wife shall be deemed to be incapable of giving consent if she is of unsound mind or has not attained the age of eighteen years.

55. *Capacity of widow to take in adoption.*—(1) Any Hindu widow who is of sound mind and has completed the age of eighteen years has the capacity to take a son in adoption to her husband.

Provided that—

(*a*) her husband has not prohibited her from adopting, and

(*b*) her power to adopt has not terminated.

(2) Nothing in sub-section (1) shall be deemed to prevent a Hindu widow who has not completed the age of eighteen years from adopting a boy named by her husband in any authority conferred on her in the manner hereinafter provided.

56. *Authority or prohibition in regard to adoption.*—(1) Any male Hindu who has the capacity to take a son in adoption as aforesaid may authorise his wife to adopt a son to him after his death, or prohibit her from doing so.

(2) Where there are more wives than one, the authority may be given to, or the prohibition imposed on, any or all of them.

(3) Where a Hindu who has left two or more widows, has expressly authorised any one or more of them to adopt a son, he shall be deemed to have prohibited the others from adopting.

57. *Manner of giving authority or imposing prohibition or revoking the same.*—(1) No authority to adopt, and no prohibition of adoption, shall be valid unless given or imposed by an instrument registered under the Indian Registration Act, 1908 (XVI of 1908), or by a will executed in accordance with the provisions of section 63 of the Indian Succession Act, 1925 (XXXIX of 1925).

(2) Any authority or prohibition so given or imposed may be revoked either by an instrument registered, or a will executed, as aforesaid.

(3) If the authority or prohibition is given or imposed by a will, it may also be revoked in any of the other modes set out in section 70 of the Indian Succession Act, 1925 (XXXIX of 1925), as modified by Schedule III to that Act.

58. *Right to adopt as between two or more widows.* —Where a Hindu has left two or more widows with capacity to take a son in adoption to him, the right to adopt is determined as between them in accordance with the following provisions:—

(*a*) If he has granted to all or any of them authority to adopt, indicating the order of preference in that behalf, the right to adopt shall follow that order.

(*b*) If he has given no such indication, the right to adopt shall follow the order of the seniority of the widows to whom authority has been granted, as determined by section 59.

(*c*) If he has neither authorised nor prohibited an adoption, the right to adopt shall follow the order of the seniority of the widows as determined by section 59.

(*d*) A widow having the right to adopt under clause (*b*) or clause (*c*) may renounce it in favour of the next senior widow by a registered instrument; if she does not so renounce it and if, without just cause, she either refuses, or fails within a reasonable time, to exercise her right when called upon to do so by the next senior or any other widow, the right shall pass to the next senior widow, and so on down to the last widow in the order of seniority.

59. *Seniority among wives and widows.*—For the purposes of this Part, seniority among the wives or widows of a person is determined by the order in which they were married to him, the woman who was married earlier being reckoned senior to the woman who was married later.

60. *Widow's right to adopt not exhausted by previous exercise.*—A widow may, subject to the provisions of this Part, adopt several sons in succession, one after the death of another, unless the authority, if any, conferred upon her by her husband otherwise provides.

61. *Termination of widow's right.*—(1) A widow's right to adopt terminates—

(*a*) when she remarries, or

(*b*) when any Hindu son of her husband dies leaving him surviving a Hindu son, widow or son's widow, or

(*c*) if she ceases to be a Hindu.

Explanation.—In this sub-section, son means a son, son's son, or son's son's son, whether by legitimate blood relationship or by adoption.

(2) The widow's right to adopt shall not revive after it has once terminated.

Capacity to give in adoption

62. *Persons capable of giving in adoption.*—(1) No person except the father or mother of the boy shall have the capacity to give the boy in adoption.

(2) Subject to the provisions of clauses (*b*) and (*c*) of sub-section (3), the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother where she is capable of giving consent.

(3) The mother may give the boy in adoption—

(*a*) if the father is dead,

(*b*) if he has completely and finally renounced the world in any of the modes set forth in sub-section (1) of section 110 of Part VII,*

(*c*) if he has ceased to be a Hindu, or

(*d*) if he is not capable of giving consent:

Provided that the father has not prohibited her from doing so by an instrument registered under the Indian Registration Act, 1908 (XVI of 1908), or by a will executed in accordance with the provisions of section 63 of the Indian Succession Act, 1925 (XXXIX of 1925).

(4) The father or mother giving a boy in adoption must be of sound mind and must have completed the age of eighteen years.

Explanation.—For the purpose of this section,—

(*i*) the expressions "father" or "mother" do not include an adoptive father or an adoptive mother ; and

(*ii*) a father or mother shall be deemedd to be incapable of giving consent if he or she, as the case may be, is of unsound mind or has not completed the age of eighteen years.

* Corresponding to sub-section (1) of section 20 of the Hindu Succession Bill, being part of a Chapter which does not appear in the Act itself ; see the Hindu Adoptions and Maintenance Act, 1956, Sec. 9 (3).

Capacity to be taken in adoption

63. *Who may be adopted.*—(1) No female shall be adopted by or to any male or female Hindu.

(2) No boy shall be capable of being taken in adoption, unless the following conditions are satisfied, namely, that—

(*i*) he is a Hindu ;

(*ii*) he has not been married ;

(*iii*) he has not been already adopted ;

(*iv*) he has not completed the age of fifteen years.

64. *Certain persons declared capable of being adopted.*—For the avoidance of doubt, it is hereby declared that the adoption of the following persons is permissible, namely: —

(*i*) the eldest or the only son of his father ;

(*ii*) the son of a woman whom the adoptive father could not have legally married, and in particular, his daughter's son, sister's son, or mother's sister's son ; and

(*iii*) a stranger although near relatives of the adoptive father exist.

. *Essential ceremonies*

65. *Completion of adoption.*—An adoption is not valid and binding unless the boy to be adopted is physically given and taken in adoption by the parents concerned or under their authority, with intent to transfer him from the family of his birth to the family of his adoption.

Explanation.—The performance of the *datta homam* is not essential to the validity of an adoption.

Other conditions for adoption

66. *Other conditions.*—(1) In every adoption, the following conditions must be complied with: —

(*i*) The adoptive father by or to whom the adop-

tion is made must have no Hindu son, son's son, or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption.

Explanation.—A person not actually born at the time of adoption although he may then be in the womb and is subsequently born alive, is not said to be living at the time of adoption for the purposes of this clause.

(*ii*) The same boy may not be adopted simultaneously by or to two or more persons nor may two or more boys be simultaneously adopted by or to the same person.

(*iii*) Every adoption must be made with the free consent of the person giving and of the person taking in adoption.

(2) Where the consent of the person giving or of the person taking in adoption has been obtained by coercion, undue influence, fraud, misrepresentation or mistake, either party may sue for a declaration that the adoption is invalid:

Provided that the Court shall dismiss such suit—

(*a*) if the suit is filed more than two years after the coercion or undue influence had ceased or the fraud, misrepresentation or mistake had been discovered ; or

(*b*) if the person whose consent has been so obtained has confirmed the adoption after the coercion or undue influence has ceased, or after the fraud, misrepresentation or mistake has been discovered, as the case may be, and such confirmation does not prejudice the rights of others.

(3) Where no suit is brought within the time limit specified in clause (*a*) of sub-section (2) or where an adoption has been confirmed under clause (*b*) of the said sub-section it shall be deemed to be valid and effectual for all purposes as from the date of the adoption.

CHAPTER II

Effects of adoption

67. *Effects of adoption.*—An adopted son shall be deemed to be son of his adoptive father for all purposes with effect from the adoption and from such date all his ties in the family of his birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

(*a*) he cannot marry any person whom he could not have married if he had continued in the family of his birth;

(*b*) any property which vested in him before the adoption shall continue to vest in him subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his birth;

(*c*) the adopted son shall not divest any person of any estate which vested in him or her before the adoption, except in the manner and to the extent specified in section 68.

68. *Divesting of estates by adoption.*—Where, after the commencement of this Code, a widow makes an adoption, the adopted son shall take—

(*a*) one-half of the estate inherited by her and her co-widows, if any, as the heirs of the adoptive father;

(*b*) if the adoption is made after the death of a son, son's son, son's son's son of the adoptive father, one-half of the estate the adoptive mother and her co-widows, if any, inherited from the adoptive father, and in addition, one-half of the estate inherited by the adoptive mother as the heir of her son, son's son, or son's son's son.

the share in the estate in each case being determined as it stood immediately before the adoption:

Provided that if the whole estate or any part thereof inherited by her or them is impartible by custom, usage or by the terms of any grant or enactment, the adopted son shall have the whole of such impartible estate as it stood immediately before the adoption in addition to what he may be entitled to under clause (*a*) or clause (*b*).

69. *Right of adoptive parents to dispose of their properties.*—Subject to any agreement to the contrary, and adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

70. *Determination of the adoptive mother in case of adoption by widower.*—(1) Where a Hindu who has a wife living adopts a son, she shall be deemed to be the adoptive mother.

(2) Where a Hindu has more than one wife living—

(*i*) that wife in association with whom or with whose consent he makes the adoption, or

(*ii*) if more than one wife has been so associated or has so consented, the seniormost in marriage among the wives so associated or consenting;

shall be deemed to be the adoptive mother, and the other wives the step-mothers, of the adopted son.

(3) Where a widower adopts at any time after his wife's death, the wife who died last immediately preceding the adoption, shall be deemed to be the adoptive mother, and any other predeceased wife or any wife subsequently married by him shall be deemed to be the step-mother, of the adopted son, unless the adoptive father has directed or given a clear indication that some other of such wives shall be deemed to be the adoptive mother, in which case, any predeceased wife who is not the adoptive mother and

any wife subsequently married by the adoptive father shall be deemed to be the step-mothers of the adopted son.

(4) Where a bachelor adopts, any wife subsequently married by him shall be deemed to be the step-mother of the adopted son.

71. *Determination of the adoptive mother in case of adoption by widow.*—(1) Where one of several widows of a deceased Hindu makes an adoption, she shall be deemed to be the adoptive mother, and the other widows the step-mothers, of the adopted son.

(2) Where two or more widows jointly make an adoption, the seniormost in marriage among the widows shall be deemed to be the adoptive mother, and the other widow or widows the step-mother or step-mothers, of the adopted son.

72. *Valid adoption not to be cancelled.*—No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted son renounce his status as such adopted son and return to the family of his birth.

73. *Certain agreements to be void.*—An agreement not to adopt, or curtailing the rights of an adopted son, is void.

CHAPTER III

Registration or record of adoptions

74. *Registration and proof of adoptions.*—(1) The State Government may, by notification in the Official Gazette, direct that in the State or in such areas as may be specified in the notification, no adoption made under the provisions of this Part shall be valid unless evidenced by a document in writing duly registered under any law

for the time being in force relating to the registration of documents.

(2) Where an adoption is required to be evidenced by a registered document under sub-section (1), no evidence shall be given in proof of such adoption except the document itself.

74A. *Recording of adoptions in cases to which section 74 does not apply.*—Where no notification has been issued under section 74, the State Government may, for the purpose of facilitating the proof of any adoption made under the provisions of this Part, by rules, provide that particulars relating to such adoption shall be entered in the Register of Adoptions maintained in this behalf by such authority as may be appointed for this purpose by the State Government:

Provided that an application is made to such authority in the manner specified in section 75.

75. *Application when to be made and particulars to be set out therein.*—The application under section 74A shall be signed by the person taking, and the person giving, in adoption and shall be made within ninety days of the adoption. It shall state the following particulars and such other particulars as may be prescribed:—

(*i*) the date of the adoption ;

(*ii*) the form of the adoption ;

(*iii*) the name or names, and the age or ages, of the person or persons taking in adoption ;

(*iv*) if the adoptive father is a married man, the name of his wife ; and if he is a widower the name of his predeceased wife ; If there are two or more wives or predeceased wives, their names, the order in which, and the dates on which, they were married to him, and the name of the wife or predeceased wife who is the adoptive mother, if any ;

(*v*) if the person adopting is a woman, the name of her husband and the names of her co-wives or co-widows, if any ;

(*vi*) the name and age of the person giving in adoption ;

(*vii*) the name of the adopted boy in the family of his birth ;

(*viii*) the age of the adopted boy ; and

(*ix*) the name of the adopted boy in the family of his adoption.

76. *Recording of adoption.*—If the authority appointed under section 74A is satisfied that the application has been signed by the person taking and the person giving in adoption and that the adoption has taken place as stated, he shall cause a record of the adoption to be made in the Register of Adoptions.

[The reader is again reminded that the Bill was entirely recast in Act 78 of 1956, for which see below.]

CHAPTER IV

The Joint Family Part of the "Hindu Code".

(Fourth Draft: 1951)

General

86. *Abrogation of right by birth and survivorship generally.**—Except in the cases and to the extent provided in this Part, no Hindu shall, after the commencement of this Code, acquire any right to, or interest in—

* *Note*: Under Sec. 6 and 19 of the Hindu Succession Act, 1956, sons will not take their ancestors' separate property as coparceners, but survivorship is not totally abolished.

(*a*) any property of an ancestor during his lifetime merely by reason of the fact that he is born in the family of the ancestor, or

(*b*) any joint family property which is founded on the rule of survivorship.

87. *Joint tenancy to be replaced generally by tenancy-in-common.*†—Except in the cases and to the extent expressly provided in this Part, all persons holding, on the commencement of this Code, any property jointly as members of a joint family shall be deemed to hold the property as tenants-in-common, as if a partition had taken place between them as respects such property on such commencement and as if each one of them is holding his or her own share separately as full owner thereof:

Provided that nothing in this section shall affect the right to maintenance and residence, if any, of the members of the joint family other than the persons who have become entitled to hold their shares separately, and any such right can be enforced as if this Code had not been passed.

88. *Rule of pious obligation abrogated.*—(1) After the commencement of this Code, no court shall, save as provided in sub-section (2), recognise any right to proceed against any male lineal descendant for the recovery of any debt due from any of his paternal ancestors or any alienation of property in respect of or in satisfaction of any such debt on the ground of the pious obligation of such descendant to dischare any such debt.

(2) In the case of any debt contracted before the

† *Note*: The Hindu Succession Act does not contemplate the extinguishing of existing coparcenaries.

commencement of this Code, nothing contained in sub-section (1) shall affect—

(*a*) the right of any creditor to proceed against any such descendant, or

(*b*) any alienation made in respect of or in satisfaction of any such debt,

and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as would have been the case if this Code had not been passed.

Explanation.—For the purposes of sub-section (2) the expression "such descendant" shall be deemed to refer to the male lineal descendant who was born or adopted prior to the commencement of this Code.

89. *Liability of members of joint family for debts before Code not affected.*—Where a debt has been contracted before the commencement of this Code by the manager or *karta* of a joint family for family purposes, nothing herein contained shall affect the liability of any member of the joint family to discharge any such debt, and any such liability may be enforced against all or any of the persons liable therefor in the same manner and to the same extent as would have been the case if this Code had not been passed.

CHAPTER II*

Mitakshara Co-parcenary

90. *Application of Chapter.*—This Chapter applies to Hindus who would have been governed by the Mitakshara school of Hindu law if this Code had not been passed.

* ***Note*: This Chapter, and in particular Sec. 90C, will have to be revised in the light of Secs. 6, 8, 14 & 19 of the Hindu Succession Act.**

90A. *Definition.*—In this Chapter,—

"ancestral property" means any property acquired by a male Hindu by way of inheritance from his father, father's father or father's father's father, and includes—

(*a*) any share in the property of any such paternal ancestor allotted to him on partition, and

(*b*) any accretions to ancestral property;

but shall not be deemed to include—

(*i*) any gains of learning as defined in the Hindu Gains of Learning Act, 1930 (XXX of 1930), acquired by him;

(*ii*) any property acquired by him otherwise than by way of inheritance:

(*iii*) any property acquired by him by way of inheritance from any person other than any of the three immediate paternal ancestors, and

(*iv*) any other separate property in his possession, although all or any of such properties are for the time being shared by him jointly with a co-parcener.

Explanation.—Accretions to ancestral property include income from such property, property purchased or acquired out of such income or with the assistance of such property, the proceeds of sale of such property, and property purchased out of such proceeds.

90B. *Co-parcenary.*—(1) A person becomes a co-parcener if the following conditions are fulfilled, namely:—

(*i*) that he—

(*a*) has either inherited any ancestral property, or

(*b*) is born in the family of the person who has inherited any such property and is a lineal descendant of such person in the male line; and

(*ii*) that in the case of any person referred to in

sub-clause (*b*) of clause (*i*) he is not for the time being removed more than four degrees—

(*a*) from the person who has inherited any such property, or

(*b*) from any of the descendants of any person who has so inherited and who is the oldest living paternal ancestor of that person in the male line.

(2) For the purpose of computing the number of degrees under sub-section (1), the person concerned and the person with respect to whom the relationship is to be traced shall each be counted as one degree.

(3) When there is a partition amongst the members of a co-parcenary, the co-parceners who have separated shall cease to be co-parceners with respect to each other; but it shall not be presumed, until the contrary is proved,—

(*a*) that each of the persons so separating has, by reason only of such separation, ceased to be a co-parcener with respect to his own descendants in the male line; or

(*b*) that, where only one co-parcener has so separated, the remaining members of the co-parcenary have, by reason only of such separation, ceased to be co-parceners as amongst themselves.

(4) "Co-parcenary" is a body of two or more male persons who are for the time being co-parceners.

90C. *Incidents of co-parcenary property.*—The following rules shall apply to any ancestral property acquired, whether before or after the commencement of this Code, by a member of a coparcenary:—

(*a*) every co-parcener shall by reason of his birth in the family of the person acquiring ancestral property have an interest in the property equal to that of his father;

(*b*) all the members of the co-parcenary shall hold the property as joint tenants;

(*c*) on the death of any co-parcener (other than the sole-surviving member) his interest in the property shall devolve by survivorship on the surviving members of the co-parcenary and not by succession on his heirs:

(*d*) notwithstanding anything contained in clause (*c*), where a co-parcener dies, his widow and daughter shall amongst themselves have in the property—

(*i*) in the case of the widow, an interest equal to that of the son,

(*ii*) in the case of an unmarried daughter, an interest equal to one-half of that of the son and, in the case of a married daughter, one-quarter of that of the son.

90D. *Extent of right of co-parcener to alienate co-parcenary property.*—Neither any co-parcener nor any female who acquires an interest in any ancestral property by reason of the provisions contained in clause (*d*) of section 90C shall, by reason merely of the fact of being a co-parcener or of having acquired such interest, be entitled to transfer or charge in any way the property except his or her undivided or other interest therein, and no court shall, in execution of any decree passed against any such member or female, proceed against any ancestral property otherwise than against the interest in the property belonging to such co-parcener or female, as the case may be.

90E. *Right to claim partition of co-parcenary property.*—(1) Any co-parcener and any female who has acquired an interest in ancestral property by reason of the provisions contained in clause (*d*) of section 90C may, at any time, claim partition and separate enjoyment of his or her share in the property whether or not the other parties concerned are agreeable thereto.

(2) Where any female who has acquired any such interest as is referred to in sub-section (1) dies without claiming partition and obtaining separate enjoyment of her share in the property, her interest in the property shall, on her death, revert to the members of the co-parcenary.

90F. *Right of co-parcener to buy off the share of another co-parcener, etc., in certain cases.**—Notwithstanding anything contained in section 90D a co-parcener may require any other co-parcener who has ceased to be a Hindu by conversion to another religion or a female who has acquired an interest in ancestral property by reason of the provisions contained in clause (*d*) of section 90C to take his or her share in the ancestral property for separate enjoyment and thereupon the provisions of the Partition Act, 1893 (IV of 1893), shall apply as if there was a partition and as if the co-parcener who has ceased to be a Hindu or the female, as the case may be, were the transferee of a share of a dwelling house belonging to the co-parcenary.

90G. *Allotment of shares on partition.*—The following rules shall apply to regulate the allotment of shares to the members of a co-parcenary on a partition being made amongst them, namely:—

(*a*) where the partition is between a father and his sons, each son shall take a share equal to that of his father;

(*b*) where the partition is between brothers, they shall take equal shares;

* *Note*: Secs. 22 & 23 of the Hindu Succession Act are a great improvement on this section.

(*c*) where the partition is between co-parceners belonging to different branches of the family, the property shall be divided amongst the branches equally *per stirpes* :

(*d*) where the partition is between co-parceners belonging to the same branch, the property shall be divided equally amongst them *per capita*.

90H. *Termination of co-parcenary.*—So long as there is no other co-parcener in the family, every person who acquires any ancestral property shall be entitled to hold the property as an absolute owner, and on his death, the property shall devolve on his heirs by succession and not by survivorship.

CHAPTER III*

Marumakkattayam, Aliyasantana and Nambudri joint families.

90I. *Special provisions respecting Marumakkattayam, Aliyasantana and Nambudri joint families.*—Nothing contained in this Part shall apply to any *tarwad, tavazhi, kutumba, kavaru* or *illom* to which the Marumakkattayam, Aliyasantana or Nambudri law would have applied if this Code had not been passed, and, notwithstanding anything contained in this Code, all matters relating to the rights (whether by way of succession or otherwise) of any person in, or the management or partition of, any such *tarwad, tavazhi, kutumba, kavaru* or *illom* shall continue to be regulated by the law which was applicable thereto immediately before the commencement of this Code, as if that law had not been repealed by this Code.

* *Note*: The policy of this Chapter will almost certainly change to accord with Secc. 7 & 30 of the Hindu Succession Act.

Miscellaneous

90J. *Savings.*—Nothing contained in this Part shall apply to—

(*a*) any estate which descends to a single heir by a customary rule of succession or by the terms of any grant or enactment; or

(*b*) any estate attached to a *sthanam* (position of dignity) and enjoyed by a single person from time to time in accordance with any law, custom or usage in force in the State of Travancore-Cochin or in the districts of Malabar, South Canara and Nilgiris of the State of Madras; or

(*c*) the following estates situated in the State of Travancore-Cochin, namely:—

Idapally, Poonjar and Kilimanoor Estates and the Valiamma Thampuran Kovilagam Estate including the Palace Fund.

CHAPTER V

The Maintenance Part of the "Hindu Code" (Fourth Draft: 1951)*

125. *Maintenance explained.*—In this Part, the expression "maintenance" includes—

(*i*) in all cases, provision for food, clothing, residence, education and medical attendance and treatment; and

(*ii*) in the case of an unmarried daughter, also the reasonable expenses of, and incident to, her marriage.

* *Note*: See note at the beginning of Chapter III of the "Code" above, and compare the provisions of Sec. 30 (2) of the Hindu Succession Act.

Personal liability to maintain members of family.

126. *Maintenance of wife.*—(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Code, shall be entitled to be maintained by her husband during his lifetime and after his death, by his father.

(2) A Hindu wife may claim maintenance from her husband only if and while she lives with him:

Provided that she shall be entitled to live separately from him without forfeiting her claim to maintenance—

(*a*) if he is suffering from a virulent form of leprosy or has been suffering from venereal disease in a communicable form and not contracted from her :

(*b*) if he keeps a concubine in the same house in which his wife is living :

(*c*) if he has been guilty of such cruelty as to render it unsafe for her to live with him :

(*d*) if he is guilty of desertion, that is to say, of abandoning her without just cause and without her consent or against her wish :

(*e*) if he has ceased to be a Hindu by conversion to another religion ;

(*f*) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

127. *Maintenance of widowed daughter-in-law.*—The obligation of a father-in-law to maintain his widowed daughter-in-law under section 126 only extends in so far as he has the means to do so and the widowed daughter-in-law is unable to maintain herself out of her own property or

to obtain maintenance from her husband's estate or from her son, if any, or his estate. Any such obligation shall cease on her remarriage.

128. *Maintenance of children and aged parents.*—(1) Subject to the provisions of this section, a Hindu is bound, during his life-time, to maintain his legitimate or illegitimate child and his aged parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father so long as he or she is a minor:

Provided that in the case of an unmarried daughter she may claim maintenance so long as she lives with her father and remains unmarried.

(3) A father may claim maintenance from his son if he is aged and infirm.

129. *Maintenance of children by mother.*—A Hindu woman is bound during her life-time to maintain her legitimate or illegitimate children if her husband is unable to do so and she has the necessary means to maintain them.

Liability of heirs to maintain dependants out of estate.

130. *Maintenance of dependants.*—(1) Subject to the provisions of section 131 the heirs of a deceased Hindu shall be bound to maintain the dependants of the deceased out of the estate inherited from the deceased by the heir.

(2) The following relatives of the deceased shall be deemed to be his dependants for the purposes of this Part, namely—

(*i*) his father:

(*ii*) his mother:

(*iii*) his widow, so long as she does not remarry;

(*iv*) his son, son of his predeceased son, or son of a predeceased son of his predeceased son, who is a minor, so long as he remains one, provided and to the extent that

he is unable to obtain maintenance, in the case of a grandson, from his father's estate, and in the case of a great-grandson, from the estate of his father or father's father ;

(*v*) his unmarried daughter, so long as she remains unmarried ;

(*vi*) his married daughter:

Provided and to the extent that she is unable to obtain maintenance from her husband or from her son, if any, or his estate :

(*vii*) his widowed daughter:

Provided and to the extent that she is unable to obtain maintenance —

(*a*) from the estate of her husband, or

(*b*) from her son, if any, or his estate, or

(*c*) from her father-in-law or his father or the estate of either of them ;

(*viii*) any widow of his son or of a son of his predeceased son, so long as she does not remarry:

Provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son, if any, or his estate ; or in the case of a grandson's widow, also from her father-in-law's estate ;

(*ix*) his minor illegitimate son, so long as he remains a minor ;

(*x*) his unmarried illegitimate daughter, so long as she remains unmarried.

131. *Extent of liability of heirs to maintain dependants.* Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a male Hindu dying after the commencement of this Code, or

where, in a case of testamentary succession, the share so obtained by a dependant is less than what would be

awarded to him or her by way of maintenance under this Part,

he or she is entitled, subject to the provisions of this Part, to maintenance from those who take the estate:

Provided that the liability of each heir shall be in proportion to the value of the share or part of the estate taken by him or her:

Provided further that no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would if the liability to contribute were enforced become, less than what would be awarded to him or her by way of maintenance under this Part.

Amount of maintenance.

132. *Amount of maintenance.*—(1) In determining the amount of maintenance, if any, to be awarded to the wife, children or aged parents under this Part, regard shall be had to—

(*a*) the position and status of the parties;

(*b*) the reasonable wants of the claimant;

(*c*) if the claimant is living separately from the father, whether he or she is justified in doing so;

(*d*) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings, or from any other source;

(*e*) the number of persons who are entitled to maintenance under the provisions of this Part.

(2) In determining the amount of maintenance, if any, to be awarded to a dependant under this Part, regard shall be had to—

(*a*) the net value of the estate of the deceased, after providing for the payments of his debts;

(*b*) the provision, if any, made under a will of the deceased in respect of the dependant :

(*c*) the position and status of the deceased and of the dependant ;

(*d*) the degree of relationship between the two :

(*e*) the reasonable wants of the dependants ;

(*f*) the past relations between the dependant and the deceased ;

(*g*) the value of his or her property and any income derived from such property, or from his or her own earnings, or from any other source :

(*h*) the number of dependants who are entitled to maintenance under the provisions of this Part ;

(*i*) in the case of a widow, her conduct.

133. *Amount of maintenance in the discretion of the court.*—(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Part, with due regard to the considerations set out in sub-section (1) or sub-section (2) of section 132, as the case may be, so far as they are applicable.

(2) The expenses that may be allowed to an unmarried daughter in respect of her marriage shall in no case exceed the value of one-half of what she would have inherited from the deceased, if he had died intestate.

134. *Amount of maintenance may be altered on change of circumstances.*—The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Code, may be altered subsequently, if there is a material change in the circumstances, justifying such alteration.

135. *Debts to have priority.*—Subject to the other provisions contained in this Part debts of every descrip-

tion shall have priority over the claims of dependants for maintenance under this Part.

136. *Maintenance when to be a charge.*—A dependant's claim for maintenance under the provisions of this Part shall not be a charge on the estate of the deceased or any portion thereof, unless the same has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

137. *Transfer where a third person is entitled to maintenance.*—Where a third person has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the existence of such right, and in such a case the right can be enforced against the property to the extent to which it would have been liable had this Code not been passed.

CHAPTER VI

The Hindu Succession Act, 1956.
(Act No. 30 of 1956)

An Act to amend and codify the law relating to intestate succession among Hindus.

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows: —

CHAPTER I

Preliminary.

1. *Short title and extent.*—(1) This Act may be called the Hindu Succession Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Application of Act.*—(1) This Act applies—

(*a*) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion :

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ;

(*c*) any person who is a convert or reconvert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions and interpretation.*—(1) In this Act, unless the context otherwise requires,—

(*a*) "agnate"—one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;

(*b*) "Aliyasantana law" means the system of law applicable to a person who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949, or by the customary Aliyasantana law with respect to the matters for which provision is made in this Act;

(*c*) "cognate"—one person is said to be a "cognate" of another if the two are related by blood or adoption but not wholly through males;

(*d*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy: and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

(*e*) "full blood", "half blood" and "uterine blood"—

(*i*) two persons are said to be related to each other by full blood when they are descended from a

common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives ;

(*ii*) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands ;

Explanation.—In this clause "ancestor" includes the father and "ancestress" the mother :

(*f*) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act ;

(*g*) "intestate"—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect ;

(*h*) "Marumakkattayam law" means the system of law applicable to persons—

(*a*) who, if this Act had not been passed, would have been governed by the Madras Marumakkattayam Act, 1932 ; the Travancore Nayar Act ; the Travancore Ezhava Act ; the Travancore Nanjinad Vellala Act ; the Travancore Kshatriya Act ; the Travancore Krishnanvaka Marumakkathayee Act ; the Cochin Marumakkathayam Act ; or the Cochin Nayar Act ; with respect to the matters for which provision is made in this Act, or

(*b*) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras as it existed immediately before 1st November 1956, and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act, by any system of inheritance in which descent is traced through the female line ;

but does not include the *aliyasantana* law :

(*i*) "Nambudri law" means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932 ; the Cochin Nambudri Act : or the Travancore Malayala Brahman Act with respect to the matters for which provision is made in this Act ;

(*j*) "related" means related by legitimate kinship :

Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another ; and any word expressing relationship or denoting a relative shall be construed accordingly.

4. *Over-riding effect of Act.*—(1) Save as otherwise expressly provided in this Act,—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act :

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for fixing of ceilings or for the devolution of tenancy rights in respect of such holdings.

CHAPTER II

INTESTATE SUCCESSION

General

5. *Act not to apply to certain properties.*—This Act shall not apply to—

(*i*) any property succession to which is regulated by the Indian Succession Act, 1925, by reason of the provisions contained in section 21 of the Special Marriage Act, 1954 ;

(*ii*) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act :

(*iii*) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124) dated 20th June, 1949 promulgated by the Maharaja of Cochin.

6. *Devolution of interest in coparcenary property.*—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

7. *Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom.*—(1) When a Hindu to whom the *marumakkattayam* or *nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad, tavazhi* or *illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *marumakkattayam* or *nambudri* law.

Explanation.—For the purposes of this sub-section, the interest of a Hindu in the property of a *tarwad, tavazhi* or *illom*, shall be deemed to be the share in the property of the *tarwad, tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad, tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *marumakkattayam* or *nambudri* law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *aliyasantana* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *aliyasantana* law.

Explanation.—For the purposes of this sub-section, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or *kavaru*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *aliyasantana* law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

Explanation.—For the purposes of sub-section (3), the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage

to succeed to the position of *sthanamdar* if this Act had not been passed.

8. *General rules of succession in the case of males.*—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:—

(*a*) firstly, upon the heirs, being the relatives specified in class I of the Schedule ;

(*b*) secondly, if there is no heir of class I, then upon the heirs being the relatives specified in class II of the Schedule :

(*c*) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased ; and

(*d*) lastly, if there is no agnate, then upon the cognates of the deceased.

9. *Order of succession among heirs in the Schedule.*—Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs ; those in the first entry in class II shall be preferred to those in the second entry : those in the second entry shall be preferred to those in the third entry ; and so on in succession.

10. *Distribution of property among heirs in class I of the Schedule.*—The property of an intestate shall be divided among the heirs in class I in accordance with the following rules:—

Rule 1.—The intestate's widow, or, if there are more widows than one, all the widows together, shall take one share.

Rule 2.—The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.—The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4.—The distribution of the share referred to in Rule 3—

(*i*) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

(*ii*) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. *Distribution of property among heirs in class II of the Schedule.*—The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

12. *Order of succession amongst agnates and cognates.*—The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:—

Rule 1.—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2.—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2, they take simultaneously.

13. *Computation of degrees.*—(1) For the purposes of determining the order of succession amongst agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

14. *Property of a female Hindu to be her absolute property.*—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

15. *General rules of succession in the case of female Hindus.*—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16—

(*a*) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband ;

(*b*) secondly, upon the heirs of the husband :

(*c*) thirdly, upon the mother and father ;

(*d*) fourthly, upon the heirs of the father ; and

(*e*) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)—

(*a*) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father : and

(*b*) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

16. *Order of succession and manner of distribution among heirs of a female Hindu.*—The order of succession among the heirs referred to in section 15 shall be and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:—

Rule 1.—Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2.—If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.—The devolution of the property of the intestate on the heirs referred to in clauses (*b*), (*d*) and (*e*) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the

mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

17. *Special provisions respecting persons governed by marumakkattayam and aliyasantana law.*—The provisions of sections 8, 10*, 15 and 23 shall have effect in relation to persons who would have been governed by the *marumakkattayam* law or *aliyasantana* law if this Act had not been passed as if—

(*i*) for sub-clauses (*c*) and (*d*) of section 8, the following had been substituted, namely:—

"(*c*) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates.";

(*ii*) for clauses (*a*) to (*e*) of sub-section (1) of section 15, the following had been substituted, namely:—

"(*a*) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;

(*b*) secondly, upon the father and the husband;

(*c*) thirdly, upon the heirs of the mother;

(*d*) fourthly, upon the heirs of the father; and

(*e*) lastly, upon the heirs of the husband.";

(*iii*) clause (*a*) of sub-section (2) of section 15 had been omitted; and

(*iv*) section 23 had been omitted.

General provisions relating to succession

18. *Full blood preferred to half blood.*—Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

* The projected modification of Sec. 10 to accommodate these Malayalis seems to have been omitted (by oversight?). J.D.M.D.

19. *Mode of succession of two or more heirs.*—If two or more heirs succeed together to the property of an intestate, they shall take the property,

(*a*) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes* : and

(*b*) as tenants-in-common and not as joint tenants.

20. *Right of child in womb.*—A person who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

21. *Presumption in cases of simultaneous death.*—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

22. *Right of pre-emption.*—(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the

interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, "court" means the court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

23. *Special provision respecting dwelling houses.*—Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling houses shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

24. *Certain widows remarrying may not inherit as widows.*—Any heir who is related to the intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son, or the widow of a brother shall not be entitled to succeed to the property of the intestate as such

widow, if on the date the succession opens, she has remarried.

25. *Murderer disqualified.*—A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

26. *Convert's descendants disqualified.*—Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives unless such children or descendants are Hindus at the time when the succession opens.

27. *Succession when heir disqualified.*—If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

28. *Disease, defect, etc., not to disqualify.*—No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

Escheat

29. *Failure of heirs.*—If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government : and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

CHAPTER III

Testamentary Succession

30. *Testamentary succession.*—(1) Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation.—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad, tavazhi, illom, kutumba* or *kavaru* in the property of the *tarwad, tavazhi, illom, kutumba* or *kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.

(2) For the removal of doubts it is hereby declared that nothing contained in sub-section (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate.*

CHAPTER IV

34. *Repeals.*—The Hindu Law of Inheritance (Amendment) Act, 1929 and the Hindu Women's Rights to Property Act, 1937, are hereby repealed.

* This sub-section is repealed by Sec. 29 of the Hindu Adoptions and Maintenance Act (p. 401).

THE SCHEDULE

(*See section* 8)

Heirs in Class I and Class II

Class I

Son ; daughter ; widow ; son of a predeceased son ; daughter of a predeceased son ; son of a predeceased daughter ; daughter of a predeceased daughter ; widow of a predeceased son ; son of a predeceased son of a predeceased son ; daughter of a predeceased son of a predeceased son ; widow of a predeceased son of a predeceased son.

Class II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father ; father's mother.

VI. Father's widow ; brother's widow.

VII. Father's brother ; father's sister.

VIII. Mother's father ; mother's mother.

IX. Mother's brother ; mother's sister.

Explanation.—In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

THE HINDU ADOPTIONS AND MAINTENANCE ACT, 1956

Act No. 78 of 1956

An Act to amend and codify the law relating to adoptions and maintenance among Hindus

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:

CHAPTER I

Preliminary

1. *Short title and extent.* (1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Application of Act.* (1) This Act applies—

(*a*) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(*b*) to any person, who is a Buddhist, Jaina or Sikh by religion, and

(*c*) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect

Note.—For Statement of Objects and Reasons, See Gaz. of India, 23-8-56, Pt. II, S. 2, Ext., p. 749. And for Report of Select Committee, See Gaz. of India, 23-11-1956, Pt. II, S. 2, Ext., p. 888.

of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:—

(*a*) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion ;

(*b*) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ; and

(*c*) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-sec. (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Cl. (25) of Art. 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression "Hindu" in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy : and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family :

(*b*) "maintenance" includes—

(*i*) in all cases, provision for food, clothing, residence, education and medical attendance and treatment :

(*ii*) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage ;

(*c*) "minor" means a person who has not completed his or her age of eighteen years.

4. *Overriding effect of Act.*—Save as otherwise expressly provided in this Act—

(*a*) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act :

(*b*) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

CHAPTER II

Adoption

5. *Adoptions to be regulated by this Chapter.*—(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which

he or she could not have acquired except by reason of the adoption nor destroy the rights of any person in the family of his or her birth.

6. *Requisites of a valid adoption.*– No adoption shall be valid unless—

(*i*) the person adopting has the capacity and also the right to take in adoption :

(*ii*) the person giving in adoption has the capacity to do so ;

(*iii*) the person adopted is capable of being taken in adoption : and

(*iv*) the adoption is made in compliance with the other conditions mentioned in this Chapter.

7. *Capacity of a male Hindu to take in adoption.*– Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption :

Provided that if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation.– If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any of them is unnecessary for any of the reasons specified in the preceding provision.

8. *Capacity of a female Hindu to take in adoption.*- Any female Hindu—

(*a*) who is of sound mind,

(*b*) who is not a minor, and

(*c*) who is not married, or if married,

whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world

or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,
has the capacity to take a son or daughter in adoption.

9. *Persons capable of giving in adoption.*—(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of sub-s. (3), the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have been declared by a court of competent jurisdiction to be of unsound mind, the guardian of a child (whether a testamentary guardian or a guardian appointed or declared by a court) may give the child in adoption with the previous permission of the court.

(5) Before granting permission to a guardian under sub-s. (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in

consideration of the adoption except such as the court may sanction.

Explanation.—For the purposes of this section—

(*i*) the expressions "father" and "mother" do not include an adoptive father and an adoptive mother ; and

(*ii*) "court" means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

10. *Persons who may be adopted.*—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely :—

(*i*) he or she is a Hindu ;

(*ii*) he or she has not already been adopted ;

(*iii*) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption ;

(*iv*) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

11. *Other conditions for a valid adoption.*—In every adoption, the following conditions must be complied with :—

(*i*) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption ;

(*ii*) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by

legitimate blood relationship or by adoption) living at the time of adoption ;

(*iii*) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted ;

(*iv*) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted ;

(*v*) the same child may not be adopted simultaneously by two or more persons ;

(*vi*) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth to the family of its adoption :

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption.

12. *Effects of adoption.*—An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that-

(*a*) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth :

(*b*) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth ;

(*c*) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

13. *Right of adoptive parents to dispose of their properties.*—Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

14. *Determination of adoptive mother in certain cases.*—(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

15. *Valid adoption not to be cancelled.*—No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16. *Presumption as to registered documents relating to adoptions.*—Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

17. *Prohibition of certain payments.*—(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-s. (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

CHAPTER III

Maintenance

18. *Maintenance of wife.*—(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—

(*a*) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her ;

(*b*) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband ;

(*c*) if he is suffering from a virulent form of leprosy ;

(*d*) if he has any other wife living ;

(*e*) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere ;

(*f*) if he has ceased to be a Hindu by conversion to another religion :

(*g*) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

19. *Maintenance of widowed daughter-in-law.* -(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance—

(*a*) from the estate of her husband or her father or mother, or

(*b*) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-s. (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

20. *Maintenance of children and aged parents.*—(1) Subject to the provisions of this section a Hindu is bound, during his or her life-time, to maintain his or her

legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.—In this section "parent" includes a childless step-mother.

21. *Dependants defined.*—For the purposes of this Chapter "dependants" mean the following relatives of the deceased:

(*i*) his or her father ;

(*ii*) his or her mother ;

(*iii*) his widow, so long as she does not re-marry :

(*iv*) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother ;

(*v*) his or her unmarried daughter, or the unmarried daughter of his pre-deceased son or the unmarried daughter of a pre-deceased son of his pre-deceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and

in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother :

(*vi*) his widowed daughter: provided and to the extent that she is unable to obtain maintenance—

(*a*) from the estate of her husband ; or

(*b*) from her son or daughter, if any, or his or her estate ; or

(*c*) from her father-in-law or his father or the estate of either of them :

(*vii*) any widow of his son or of a son of his pre-deceased son, so long as she does not re-marry: provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate or in the case of a grandson's widow, also from her father-in-law's estate ;

(*viii*) his or her minor illegitimate son, so long as he remains a minor :

(*ix*) his or her illegitimate daughter, so long as she remains unmarried.

22. *Maintenance of dependants.*—(1) Subject to the provisions of sub-s. (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-s. (2) or sub-s. (3), no person who is himself or herself a depen-

dant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

23. *Amount of maintenance.*—(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-s. (2) or sub-s. (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—

(*a*) the position and status of the parties :

(*b*) the reasonable wants of the claimant :

(*c*) if the claimant is living separately, whether the claimant is justified in doing so ;

(*d*) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source ;

(*e*) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—

(*a*) the net value of the estate of the deceased after providing for the payment of his debts ;

(*b*) the provision, if any, made under a will of the desceased in respect of the dependant ;

(*c*) the degree of relationship between the two ;

(*d*) the reasonable wants of the dependant ;

(*e*) the past relations between the dependant and the deceased ;

(*f*) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source:

(*g*) the number of dependants entitled to maintenance under this Act.

24. *Claimant to maintenance should be a Hindu.*—No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.

25. *Amount of maintenance may be altered on change of circumstances.*—The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.

26. *Debts to have priority.*—Subject to the provisions contained in S. 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

27. *Maintenance when to be a charge.*—A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

28. *Effect of transfer of property on right to maintenance.*—Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

CHAPTER IV

29. *Repeals.*—The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, and sub-s. (2) of S. 30 of the Hindu Succession Act, 1956, are hereby repealed.

30. *Savings.*—Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

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